Decision mailed: 8/12/08
Civil Service Commission
CB

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

MATTHEW C. EDSON, G2-07-257
Appellant

v.

TOWN OF READING,
Respondent/Appointing Authority

Appellant's Attorney: Richard O'Neill, Jr.
Richard O'Neill, Jr. & Associates, P.C.
2500 Main Street, Suite 112
Tewksbury, MA 02876

Respondent's Attorney: Nathan L. Kaitz
Morgan, Brown & Joy, LLP
200 State Street
Boston, MA 02109

Commissioner: Daniel M. Henderson (for minority)

DECISION ON RESPONDENT'S MOTION TO DISMISS

Pursuant to G.L. c. 31 § 2(b), the Appellant, Matthew Edson (hereinafter "Appellant" or "Edson"), appealed the decision of the Town of Reading (hereafter "Town" or "Appointing Authority") claiming that he was bypassed for promotion to the rank of Sergeant with the Town of Reading Police Department, and requesting he be promoted to such rank with back pay. A Pre-hearing conference was scheduled for October 10, 2007. The Town submitted a Motion to Dismiss on September 26, 2007; on the ground that the Appellant and the bypassing candidate chosen, had the same score, (tie) on the civil service exam, thereby creating a non-bypass

situation. The Appellant submitted a response and request for Continuance to October 11, 2007. A Pre-hearing conference was held at the offices of the Civil Service Commission (hereinafter "Commission") on October 11, 2007. On that same day the Commission heard the second day of Full Hearing on the Appellant's separate and previously filed appeal, Docket No. G2-05-195.

FINDINGS OF FACT:

1. The Appellant is a police officer in the Town of Reading.
2. In 2005, the Appellant filed an appeal, Docket No. G2-05-195, with the Commission regarding his bypass to the position of Sergeant with the Reading Police Department. The merits of the appeal, G2-05-195, are not addressed by this decision regarding G2-07-257.
3. On or about April 24, 2007, the Town of Reading sought a certified list from the Human Resource Division ("HRD") for the filing of two (2) Sergeant vacancies with the Police Department. (Town's Motion to Dismiss, Exhibit A).
4. HRD issued the Town a certification list, #270398, on which there appeared five (5) names. The name John T. McKenna appeared highest on the list and the name of the Appellant appeared second or next highest on the list. The name, Mark D. Segalla appeared third or next highest after the Appellant. The Appellant and Segella received the same score and thereby were tied in score. After Segella, the name Michelle E. Halloran appeared and after Halloran the name Michael R. Lee appeared. Halloran and Lee received the same score and thereby were tied in score. (Town's Motion to Dismiss, Exhibit A).
5. After receipt of the certification list, four members of the Police Department's command staff conducted a panel interview of the four candidates and thereafter submitted their recommendations to the Chief. (Town's Response to Appellant's Opposition to Motion to Dismiss, Exhibit A p. 6).

6. Three of the four members of the command staff ranked the Appellant third (3rd) out of the four candidates, and the other member of the command staff ranked the Appellant fourth (4th). (Town's Response to Appellant's Opposition to Motion to Dismiss, Exhibit A p.6).
7. The principal reasons cited by the command staff for their ranking of the Appellant concerned his (1) abrupt resignation from the School Resource Officer ("SRO") position, (2) his sub-par performance in his interview with this sergeants promotion review panel, and (3) his 'good but inconsistent' performance as a police officer. (Town's Response to Appellant's Opposition to Motion to Dismiss, Exhibit A).
8. On or about May 30, 2007, the Town selected John T. McKenna and Mark D. Segalla for the two positions of Sergeant and submitted its selection to HRD. (Town's Motion to Dismiss, Exhibit B).
9. The Town did not file with HRD any written statement of reasons for choosing Mark D. Segella instead of the Appellant for the second sergeant position, as required by G.L. c. 31 § 27. Section 27 states in relevant part 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 the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator."
10. On or about June 6, 2007, HRD approved the Town's selection. (Town's Motion to Dismiss, Exhibit C).

11. The Appellant was not provided by HRD, with written notice of its approval of the appointing authority's written explanation as to the reasons he was not selected or bypassed for promotion, as required by G.L. c. 31 § 5 (a), (c) and (d) and § 27, and PAR.09. (Appellant's Opposition to Motion to Dismiss, administrative notice).

CONCLUSION OF THE MINORITY (Henderson, Taylor):

A "bypass" appeal to the Commission arises when an appointing authority appoints or promotes a person whose name is not at the top of the certified eligibility list. In effect the higher named person is bypassed for appointment or promotion by a person appearing lower on the list. The Commission adjudicates the appeal as a review of the personnel administrator's approval of the appointing authority's written statements of reasons for the bypass. See G. L. c. 31 § 27.

The personnel administrator, (HRD) is not merely a "ministerial depository" or rubber stamp in the bypass process. Chapter 31 charges HRD with the responsibility to evaluate the qualifications of applicants for civil service positions in accordance with basic merit principles and requires HRD to administer, enforce and comply with civil service law and rules. The court has plainly assumed that G.L.c.31§27 requires the personnel administrator, (HRD) to perform a review of the reasons as part of the "procedural scheme" which protects and furthers civil service merit principles. This requirement in the procedural scheme indicates an affirmative duty on the part of personnel administrator, (HRD) to approve, accept or affirm the bypass reasons forwarded to it by the appointing authority, see Bielawski v. Personnel Administrator 422 Mass. 459, (1996) and MacHenry v. Civil Service Commission 40 Mass. App. Ct. 632, (1995). There are more specific responsibilities placed on the administrator, in this area by G.L. c.31 §3 (c), (d) and (e) and § 5 (a), (c) and (d).

The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). In this present matter, the Town has not even stated its written reasons for the non-selection of the Appellant, since it believes that a tie score among candidates does not present a bypass event. Apparently HRD concurred with the Town's view, since it approved of the Town's selection of the two candidates without requiring a written statement of reasons.

Considering the appeal at hand, the Town did bypass the Appellant by selecting another candidate whose name appeared lower on the certification list than the Appellant's name, despite the equal score of the two candidates on the civil service exam. HRD Personnel Administration Rules ("PAR") issued pursuant to G.L. c. 31, §§ 3(d) and 5, defines 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. The Town argues that the Commission must dismiss the Appellant's appeal as the case does not concern a bypass situation. Rather, the Town maintains that the Appellant was tied with the

candidate listed fourth on the list, and a tie is not a bypass. The Appellant's position is that this *is* a bypass situation because a tie-score should constitute a bypass.

The Commission, over the last several years had previously determined that the appointment of one candidate among several with the same score on the civil service exam, (tied score), did not constitute a bypass. See Bartolomei v. City of Holyoke Docket No. G2-07-386 (2008), Johnston v. City of Everett, 20 MCSR 295 (2007), Bianco v. Newton Fire Department, Docket No. G2-06-107 (2007), LaPierre v. City of Chicopee, Docket No. G2-07-2007 (2007). This line of cases traces its genesis back to Kallas *v.* Franklin School Department, 11 MCSR 73 (1996), the Commission declared in the *Kallas* decision, what it believed at that time, 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...". However, that conclusory assertion in *Kallas* is made without citing any supporting authority.

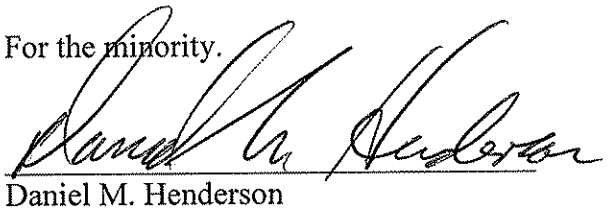
The conclusion or interpretation contained in the cited line of Commission decisions, *supra* is an aversion to the clear declaration on the issue in Cotter *v.* City of Boston, 73 F. Supp.2d 62, 66 (1999). The U.S. District Court, (Young, J.), held that "any selection among equally-scoring candidates...is a 'bypass' because all of their names appear highest. Accordingly, the appointment of less than an entire group of equally-scoring candidates triggers section 27: i.e., it would appear that the appointing authority must immediately file with Hartnett [HRD] a written statement of reasons for not appointing the entire group (even if there are not enough openings for all of them). *See id.* Such justifications are subject to Hartnett's [HRD's] review. *See MacHenry*, 40 Mass. App. Ct. at 635"

There is at least one superior court justice who agrees with judge Young's view in *Cotter.* Justice Cratsley concluded that one situation involving "a bypass is a situation where one candidate is chosen over another who has the same score, thereby entitling the bypassed person to relief." See decision and order in Monteiro v. Mass. Civil Service Commission and Department of Brockton, Suffolk Superior Court C.A. No. 07-2632-D, page 4 (Cratsley, J), July 24, 2008. Justice Cratsley repeated this conclusion in another decision and order of the same date. See Rodrigues v. Mass. Civil Service Commission and Department of Brockton, Suffolk Superior Court C.A. No. 07-2529D, page 4, July 24, 2008.

The Town did not file a written statement of reasons with HRD for appointing the person whose name was not highest on the certification list of eligible candidates, as required by G.L. c. 31§ 27. Therefore, the personal administrator was unable to approve any claimed reasons for the Appellant's bypass which is also required by § 27. "Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator." The Appellant's claim that he was not informed as to the reasons why he was not promoted is a violation of civil service law. When the Appointing Authority selects between candidates whose scores are tied, it must submit a written statement of reasons to HRD, for approval. There is a bypass in this matter.

In conclusion, the minority concludes that the Commission does have jurisdiction to hear this bypass appeal; as *there was a bypass, with no written statement of reasons for bypass being submitted by the Town to HRD and therefore no approval of the reasons for bypass by HRD, as required by section 27.*

For the minority.



Daniel M. Henderson
Commissioner

CONCLUSION OF THE MAJORITY (Bowman, Stein and Marquis)

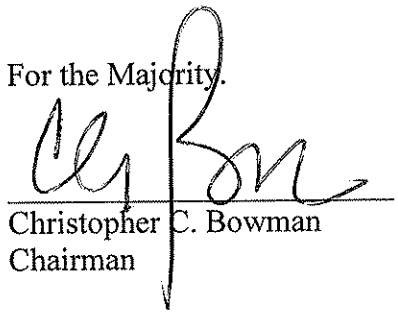
The majority adopts the findings of fact of Commissioner Henderson stated above. Based on those findings, and for the reasons discussed below, the majority reaches a different conclusion than the minority.

Years of Commission decisions have well-established that when a civil service exam results in a tie-score, and the Appointing Authority promotes some but not all of the tied candidates, no "bypass" has occurred. This is the same conclusion that Judge Young finally reached in Cotter in the District Court's decision on the merits. See Cotter v. City of Boston, 193 F. Supp.2d 62, 323 (D. Mass. 2002), rev'd other grounds, 323 F.3d 160 (1st Cir.), cert.den., 540 U.S. 825 (2003).

The policy and practice within civil service that selection from amongst tied candidates is not considered a bypass has also been recognized by the Massachusetts Superior Court. In Thompson v. Civil Service Commission, No. 95-5742, Middlesex Superior Court (1996), the Superior Court affirmed the Commission's dismissal of a bypass appeal where the plaintiff's "allegations of 'bypass' were incorrect since no individual selected received a score lower than his." The Superior Court noted that "[i]f a person selected has a lower score than an individual not selected then the person 'bypassed' must receive a statement of reasons for the bypass." Id. The Court found that the plaintiff in Thompson had not been bypassed because the individuals who had been appointed all had the same or higher scores. Id. Thus, he was not an "aggrieved person" within G.L. c. 31. Id.

For all of the reasons stated by the majority, the Appointing Authority's Motion to Dismiss is *allowed* and the Appellant's appeal under Docket No. G2-07-257 is hereby ***dismissed.***

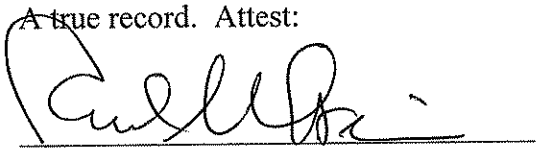
For the Majority.



Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; Taylor, Commissioner - No) on August 7, 2008.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 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 sent to:
Richard O'Neill, Jr., Esq. (for Appellant)
Nathan L. Kaitz, Esq. (for Appointing Authority)
John Marra, Esq. (HRD(