

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

ZYRE ANDRADE,

Appellant

v.

CITY OF NEW BEDFORD

Respondent

Docket Number:

G1-24-054

Appearance for Appellant:

Joseph L. Sulman, Esq.
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Waltham, MA 02451

Appearance for Respondent:

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Commissioner:

Paul M. Stein

SUMMARY OF DECISION

The Commission affirmed the decision of the New Bedford Fire Department to bypass a candidate for firefighter based on his recent misconduct as a New Bedford Police Department dispatcher.

DECISION

On April 19, 2024, the Appellant, Zyre Andrade, acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the City of New Bedford (New Bedford) to bypass him for appointment as a permanent full-time firefighter for the New Bedford Fire Department (NBFD).¹ The Commission held a remote pre-hearing videoconference

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

on May 21, 2024 and an in-person full hearing at the UMass School of Law at Dartmouth on July 12, 2024. The full hearing was digitally recorded.² Both parties submitted Proposed Decisions on September 30, 2024. For the reasons set forth below, the Appellant's appeal is denied.

FINDINGS OF FACT

Twenty exhibits were introduced into evidence during the hearing (*Jt.Exhs.1 through 17; App.Exhs.1 & 2; Resp.Exhs.1 & 3*) and two exhibits were marked for Identification (*App.Exh.3; Resp.Exh.2*). Based on the documents submitted and the testimony of the following witnesses:

Called by the City of New Bedford:

- Scott Kruger, NBFD Fire Chief
- Brian Medeiros, NBFD Deputy Fire Chief
- Paul Oliveira, Chief, New Bedford Police Department

Called by the Appellant:

- Zyre Andrade, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

Appellant's Background

1. The Appellant, Zyre Andrade, is a life-long New Bedford resident and a graduate of the Greater New Bedford Regional Vocational Technical High School. He has taken courses at a local community college toward a degree in criminal justice. (*Jt.Exh.3*)

² A copy of the recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

2. As part of his high school education, the Appellant served as an intern with the New Bedford Police Department (NBPD). Upon graduation from high school, he was hired by the NBPD as a full-time police cadet, working primarily in the communications unit as a back-up dispatcher. In February 2022, he relinquished his status as a police cadet to accept employment as a certified full-time civilian NBPD 911 police dispatcher. (*Jt.Exh.3; Testimony of Appellant*)

The NBPD Dispatcher Overtime Issue

3. During the relevant period, NBPD Sergeant Samuel Ortega supervised the communications unit of approximately a dozen or more NBPD dispatchers, including the Appellant, which included oversight of their training and overtime assignments. (*Jt.Exh.12; Testimony of Appellant*)

4. As a condition of employment as an NBPD dispatcher, the Appellant was required to maintain his proficiency and certification, which included completing one or two 8-hour on-line mandatory training courses biennially. (*Jt.Exh.12; Testimony of Appellant*)

5. The Appellant's on-line training record showed that he logged into the training website (Power Phone) and was working on training modules for a total of approximately 35 hours during the following times in 2022 and 2023:

- September 15, 2022 – (Evening Shift) 4:03 pm to 10:51 pm (6 hours, 48 minutes)
- September 21, 2021 – (Evening Shift) 3:54 pm to 6:09 pm (3 hours, 15 minutes)
- September 26, 2022 – (Evening Shift) 3:59 pm to 11:57 pm (7 hours, 59 minutes)
- September 27, 2022 – (Night Shift) 12:03 am to 3:19 am (3 hours, 16 minutes)
- September 28, 2022 – (Day Shift) 8:07 pm to 8:16 pm (0 hours, 9 minutes)
- May 23, 2023 – (Night Shift) 12:17 am to 7:36 (7 hours, 19 minutes)
- May 24, 2023 – (Night Shift) 12:02 am to 6:35 am (6 hours 33 minutes)

(*Jt.Exh.12*)

6. The Appellant's NBPD attendance records show that the Appellant was on duty working a regularly scheduled or forced overtime shift on September 15, 21, 26 & 27, 2022 and on May 23 & 24, 2023 during the time that he was logged on to the training website on those dates. The attendance records also show that, on September 28, 2022, the Appellant worked a regularly

scheduled Evening Shift (4 pm to 12 am) but he did not work overtime on the Day Shift (8am to 4pm), save for 9 minutes of training time logged during that shift. (*Jt.Exh.12*)

7. NBPD attendance records show that the Appellant submitted an “Overtime Pay Request Form” to Sergeant Ortega for his approval for these additional three full overtime shifts:

- September 28, 2022 – 8 hours - Day Shift (8am to 4pm) “EMD Recertification”
- May 23, 2023 – 8 hours - Day Shift (8 am to 4 pm) “Crisis Communications”
- May 24, 2023 – 8 hours – Day Shift (8am to 4pm) “Stress Identification Management”

Save for 9 minutes of training time logged on the Day Shift for September 28, 2022, the Appellant was not on duty, he was not training, and he did not work any of these shifts. (*Jt.Exh.12; Testimony of Appellant*)

8. The Appellant submitted overtime slips for September 28, 2022 and May 23 & 24, 2023 because he then thought it was the accepted practice to be reimbursed for his training time, based on his discussions with other senior dispatchers and his conversations with them. Also, Sergeant Ortega had told him he needed to submit an overtime slip so that he could get paid for the time spent to complete the mandatory training. (*Jt.Exhs.4 &12; Testimony of Appellant*)³

9. At some point in 2023, NBPD Chief Oliveira came to learn of a potential problem with unauthorized overtime being paid to dispatchers in the communications unit. He directed Sergeant Ortega to conduct an initial audit of the dispatchers’ training records. His audit discovered what appeared to be a widespread practice by many dispatchers of submitting Overtime Pay Request Forms for extra overtime compensation for completing E-911 training when, in fact, the training had been completed during normal or already scheduled overtime shifts; some dispatchers were

³ Based on the evidence, I infer that the Appellant misconstrued Sergeant Ortega’s statement. Nothing suggested that Sergeant Ortega ever told the Appellant to submit overtime for shifts he didn’t work; I infer that Sergeant Ortega meant to convey the message that if training was done outside regular working hours, a dispatcher could be paid for the time spent by submitting an appropriate overtime slip. (*Resp.Exh.12; Testimony of Appellant & Chief Oliveira*)

submitting overtime requests for overtime which exceeded the actual hours it took to complete the training, and some dispatchers engineered “accelerated” review of the training modules that enabled them to finish the modules in less time than what was needed to complete the training competently. (*Jt.Exh.12: Testimony of Police Chief Oliveira*)

10. In view of the apparent magnitude of the problem, Chief Oliveira retained an outside consultant (Alfred P. Donovan of APD Management) to conduct an investigation of the communications unit. (*Jt.Exhs.12 & 17; Testimony of Police Chief Oliveira*)

11. Mr. Donovan reviewed the NBPD’s rules and regulations, the attendance and training records of all of the dispatchers in the NBPD communications unit and then conducted interviews with selected dispatchers and their superior officers. (*Jt.Exh.12*)

12. The Appellant was interviewed by Mr. Donovan on September 8, 2023. The Appellant acknowledged that he had submitted overtime for shifts he didn’t work and explained that he had been led to believe from senior dispatchers that it was an acceptable practice that Sergeant Ortega knew about, although the Appellant said Sergeant Ortega “never directly stated to me to do that.” (*Jt.Exh.12; Testimony of Appellant*)

13. In a report dated October 17, 2023, Mr. Donovan concluded that the Appellant had violated numerous NBPD rules by submitting overtime pay requests and received compensation for hours not worked on September 28, 2022, March 23, 2023 and March 24, 2023. (*Jt.Exh.12*)

14. In a supplemental report dated November 7, 2023, Mr. Donovan concluded that most NBPD dispatchers also violated NBPD rules by submitting overtime pay requests for training they performed during their regularly scheduled shifts. (*Jt.Exh.16*)

15. Chief Oliveira deferred taking action to impose discipline because he wanted to review Mr. Donovan’s complete investigation reports covering of all other dispatchers and, with the full

picture in mind, to reach a conclusion about what appropriate discipline was warranted relative to each individual dispatcher, which Chief Oliveira expected would vary depending on the amount of the overtime involved, the scope of the violations and the employee's past disciplinary history and possibly other factors. He wanted to impose the discipline of all employees at the same time and thought it would not be wise to proceed "piecemeal." (*Testimony of Police Chief Oliveira*)

16. Ultimately, on or about April 10, 2024, Chief Oliveira finalized his decisions and notified twelve dispatchers, including the Appellant, that he was contemplating imposing discipline on them and had scheduled a hearing (for the Appellant, on April 18, 2024). The letters did not specify the level of discipline other than it could be "up to and including termination." (*Jt.Exh.15; Resp.Exh.1; Testimony of Police Chief Oliveira*)

17. Nine of the dispatchers accepted a negotiated discipline, which ranged from 5-day suspensions and a 7-year Last Chance Agreement (\$300 restitution paid) to 25-day suspensions and a 10-year Last Chance Agreement (\$1,069 restitution paid). All nine are currently still employed with the NBPD, including one senior dispatcher with seven violations over three years totaling more than \$2,000 in improperly claimed overtime. Two of the senior dispatchers with the largest overtime paid (\$2,027 and \$1,590) made restitution and resigned. (*Jt.Exhs.16 & 17; Testimony of Police Chief Oliveira*)

18. On April 8, 2024, two days prior to receiving notice of contemplated discipline by the NBPD, the Appellant had submitted two-weeks' notice of his intended resignation from the NBPD, then expecting he would begin the Fire Academy on April 22, 2024, as stated a conditional offer of employment from the NBFD, described in more detail below. (*Jt.Exh.5, 6 & 13; App.Exhs.1 & 2; Testimony of Appellant, Fire Chief Kruger & Police Chief Oliviers*)

19. By letter dated April 22, 2024, after the Appellant had made restitution of the \$848.00 in overtime pay he received improperly, the NBPd accepted the Appellant's resignation. The letter also stated that "despite your resignation and the City's acceptance of same, the City is offering you a *Loudermill* hearing⁴ on April 24, 2024 to allow to answer these allegations should you elect to do so. The Appellant declined to participate in the hearing. (*Jt.Exhs.14 & 15; Resp.Exh.2; Testimony of Appellant & Fire Chief Oliveira*)

20. Although the Appellant was never disciplined, Chief Oliviera's intention was to impose a 10-day suspension on the Appellant, along with a 7-year Last Chance Agreement, based on the "middling" amount of overtime pay the Appellant received compared to his peers, his lack of any prior discipline, and the fact that he did not exaggerate the underlying hours spent in performing his training (the training logs showed over 35 hours spent training for the 24 hours of overtime claimed). (*Jt.Exhs.12 & 17; App.Exh.3ID; Testimony of Police Chief Oliviera*).

The Appellant's Bypass by the NBPd

21. In October 2022, the Appellant took and passed the civil service examination for firefighter administered by the state's Human Resources Division (HRD). His name was placed on the Firefighter eligible list established on April 1, 2023. (*Jt.Exh.2; Administrative Notice [NEOGOV Master Record attached to HRD Pre-Hearing Submission]; Testimony of Appellant*)⁵

⁴ The U.S. Supreme Court held in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) that due process entitles a public employee against whom discipline is contemplated to a preliminary "pre-determination" hearing to "present his side of the story", either in person or in writing, before discipline is imposed, and without prejudice to the right to a future full-blown post-determination evidentiary proceeding after discipline is imposed. *Id.* 470 U.S. at 546.

⁵ The Appellant also took and passed two Municipal Police Officer/State Trooper entry level examinations, and his name appeared on the eligible lists for those positions, established 8/6/21 and 6/22/23 respectively. (*Administrative Notice [NEOGOV Master Record attached to HRD Pre-Hearing Submission]*)

22. On October 31, 2023, HRD issued Certification #09571 to the NBFD to appoint six (later increased to ten) permanent firefighters. The Appellant's name was ranked 10th, tied with four other candidates. (*Jt.Exhs.1 & 2*)

23. On November 1, 2024, the Appellant submitted his application and supporting documents for consideration of appointment as a NBFD firefighter. (*Jt.Exh.3*)

24. The NBPD was delegated to perform a background investigation of the Appellant, which confirmed his New Bedford residency, found no criminal history, two speeding citations and three at fault accidents from 2019 to 2022, and no negative references. The NBFD was made aware of the investigation into the alleged overtime infractions involving the Appellant and other NBPD dispatchers, but did not request, and did not receive, Mr. Donovan's reports or other details of the investigation as part of the background investigation. Chief Kruger learned at the time from Chief Oliveira only that an investigation was pending and no decisions had been made about discipline. (*Testimony of Fire Chief Kruger, Deputy Fire Chief Medeiros & Police Chief Oliveira*)

25. A panel of NBFD command staff interviewed the Appellant on February 14, 2024. Chief Kruger typically would participate but he was not available for the interviews which were headed by Deputy Fire Chief Brian Medeiros. The interviews were audio-recorded and a copy of the Appellant's interview was introduced into the Commission hearing record. (*Jt.Exh.4; Testimony of Fire Chief Kruger & Deputy Chief Medeiros*)

26. During the Appellant's interview, he brought up the subject of the NBPD investigation into his misuse of overtime when he was asked to describe a situation in which he had made a mistake and how he learned from it. The Appellant acknowledged that he had submitted overtime pay requests as reimbursement for his training time for overtime shifts that he didn't work, explaining that he thought it was approved by Sergeant Ortega and that is how the senior dispatchers did it.

He acknowledged that he made a mistake and would not do it again. (*Jt.Exh.4; Testimony of Appellant & Deputy Chief Medeiros*)

27. By letter dated February 26, 2024, the Appellant received a conditional offer of employment as a firefighter with the NBFD, subject to his passing the Initial Hire Medical Exam and the Initial Hire Physical Ability Test (PAT). The letter stated that upon meeting those requirements “you will begin the recruit academy on Monday, April 22, 2024.” (*Jt.Exhs.5 & 6*)

28. Chief Kruger decided to issue to the Appellant the conditional offer based on his overall qualifications which Chief Kruger found satisfactory. He did not consider the Appellant’s pending issues at the NBPD as then disqualifying because he understood the investigation was still ongoing, and no decisions had been made whether to discipline the Appellant. (*Testimony of Fire Chief Kruger*)

29. By letter (and email) dated April 12, 2024, Chief Kruger informed the Appellant that the NBFD had received “new information”, namely, the April 10, 2024 notice of the NBPD’s contemplated discipline of the Appellant “up to and including termination” for alleged “wage theft and intentional falsification of time records” resulting in “\$848 in fraudulent overtime payments from the City”, in violation of numerous NBPD rules and “conduct unbecoming a City employee,” all as detailed by an “independent investigation conducted by an outside investigator retained by the New Bedford Police Department.” As a result of this “new information”, the NBFD rescinded the Appellant’s offer of employment. (*Jt.Exh.9*)⁶

30. As of the date of the April 12, 2024 rescission letter, the NBFD had not received the results of the Appellant’s medical exam and the Appellant had not taken the PAT. (*App.Exhs.1 & 2*)

⁶ As of the date of the April 12, 2024 letter, NBFD had not received the results of the Appellant’s medical exam and the Appellant had not take the PAT. (*App.Exhs.1 & 2*)

31. By separate letters on April 12, 2024 and April 26, 2024, Chief Kruger informed the Appellant that he has been bypassed for appointment as a firefighter with the NBFD and that three other candidates ranked below the Appellant on the eligible list had been appointed. The letters stated the following reasons for the decision to bypass the Appellant:

“As set forth in my April 12, 2024 letter rescinding your conditional offer of employment, the Fire Department has learned since it made this conditional offer that as a result of an investigation . . . you were notified on April 11, 2024, that a hearing to contemplate discipline up to and including termination is going to be held due to your serious misconduct while employed at the Police Department. Specifically, it is alleged that on September 28, 2023, May 23, 2023 and May 24, 2023, you submitted falsified time records in order to obtain wage payments for hours you did not work. That conduct violates numerous Police Department General Orders and constitutes wage theft. In my letter I pointed out that such conduct is also a violation of Fire Department SOP 112 Code of Conduct and employment by the Fire Department of an individual engaging in this type of conduct is clearly contrary to public policy.

“Accordingly, this misconduct renders you unqualified to be a Firefighter. . . . entrusted with public safety responsibilities and the protection of the public.

There is no information that the selected candidates below you have engaged in this type of misconduct, and they are otherwise qualified for the position. . . .”

(*Jt.Exhs.8, 10 & 11; Resp.Exh.3*).

32. This appeal duly ensued.(*Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Original appointments of civil service employees are made from a list, called a “certification”, with candidates’ names ranked in the order in which they appear on the applicable civil service

“eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘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’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a valid exercise of discretion

based on merit or policy considerations by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*, then the occasion is appropriate for intervention by the commission.” *Id.* (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev. den.*, 428 Mass. 1102 (1997); Police Comm’r v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, *rev. den.* 398 Mass. 1103 (1986).

ANALYSIS

The NBFD met its burden to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for appointment as a firefighter due to his recent misconduct as a dispatcher with the NBPD. The six-month delay by the NBPD to proceed with discipline against the Appellant for his misconduct threw off the timing of the NBFD’s hiring decisions. Had the NBPD acted sooner, and had the Appellant been disciplined (or cleared) before his conditional offer, the NBFD decision would have been much easier to make. In the final analysis, however, on this record, the Appellant’s misconduct was serious, it is not disputed, and there is no evidence to suggest that the decision may have been improperly influenced by any post-conditional offer medical information. In sum, when the NBFD made its decision to bypass the Appellant in April 2024, the facts known to the NBFD at that time created reasonable doubt about the Appellant’s current suitability to perform the duties of a firefighter and provided reasonable justification for

the conclusion that hiring the Appellant at that time presented an unacceptable risk that the NBFD legitimately was not willing to take.

I do not doubt that, at the time he participated in the overtime training scheme, the Appellant saw that his peers were taking advantage of the system to earn what they thought they had coming to them as extra pay for completing mandatory training time and he saw no reason not to do the same. I also have not overlooked the fact that the Appellant's misconduct, while more serious than some, was not as egregious as others who are still employed by the NBPD. I also agree, however, that the NBPD and the NBFD deserve to expect a public safety employee to be more proactive when it comes to knowing right from wrong than the Appellant demonstrated here.

The Appellant presents many positive qualities that would serve him well as a public safety officer. I credit the Appellant's candor during the NBFD hiring process and in his testimony at the Commission hearing, and find that, as a result of these proceedings, he now genuinely understands what is expected of him. I do not believe the reasons that tripped up the Appellant here should be, or will be, a forever impediment to future employment in the fire service. That conclusion, however, does not change the fact that, at the time he was bypassed, the NBFD had reasonable justification to do so.

CONCLUSION

For the reasons stated herein, the Appellant's appeal under Docket Number G1-24-054 is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Markey, McConney & Stein, Commissioners [Dooley – Absent]) on February 20, 2025.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Joseph L. Sulman, Esq. (for Appellant)

Eric T. McKenna, Esq. (for Respondent)