

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

ZACHARY AVERY,
Appellant

v.

G1-21-080

CITY OF SOMERVILLE,
Respondent

Appearance for Appellant:

Leah Barrault, Esq.
The Labor Collaboration, LLC
12 Granite Street
Quincy, MA 02169

Appearance for Respondent:

Jason Piques, Esq.
Somerville City Hall
Law Department
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Somerville, MA 02143

Commissioner:

Christopher C. Bowman¹
Cynthia A. Ittleman

SUMMARY OF DECISION

The Civil Service Commission denied the Appellant’s bypass appeal for reserve firefighter. The Appellant has several positive attributes, including his service in the United States Army and his employment with the City’s Water Department. The City had reasonable justification to bypass him for appointment, however, based, in part, on concerns related to the Appellant’s prior discipline, including a failed drug test related to an expired Percocet prescription, and his driving record, which contained two at-fault accidents within the past five years and one speeding ticket for which he was found responsible. Further, there was no evidence to show that the decision here was the result of any personal bias or favoritism, as alleged by the Appellant. No finding in this decision should be deemed as permanently disqualifying for future appointment.

¹ Commissioner Ittleman conducted the full hearing regarding this appeal, but she retired from the Commission prior to drafting a decision. For that reason, the appeal was assigned to me. I have reviewed the entire record in this matter, including the audio / video recording of the full hearing and all exhibits.

DECISION

On April 12, 2021, the Appellant, Zachary Avery (Appellant), pursuant to M.G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission) contesting the decision of the City of Somerville (City) to bypass him for appointment to the position of reserve firefighter in the City's Fire Department. On June 22, 2021, I held a remote pre-hearing conference. A full hearing of the appeal was held before Commissioner Cynthia A. Ittleman on September 15, 2021.² The hearing was digitally recorded, and the parties were provided a link to the recording.³ The parties submitted post-hearing briefs in the form of proposed decisions on or about November 12, 2021.

FINDINGS OF FACT

Seven Respondent exhibits and seven Appellant exhibits were entered into evidence at the hearing. Further, documents were produced, post-hearing, and made part of the record, to include three documents produced by the Appellant: (1) Credit Karma printout; (2) Cleaning fee receipt of payment; (3) Receipt from a jeweler regarding a settlement payment. Based on the documents submitted, the testimony of the following witnesses:

Called by the City:

- Detective Michael Faria, Somerville Police Department;
- Chief Charles Breen, Somerville Fire Department;
- Assistant Chief Christopher Major, Somerville Fire Department;

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ 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 he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, the recording sent to the parties should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Called by Appellant:

- Zachary Avery, Appellant

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, policies, stipulations and reasonable inferences from credible evidence; a preponderance of the evidence establishes the following:

1. Zachary Avery is a 2011 high school graduate. Following graduation, the Appellant enlisted in the United States Army from 2011-2015. He was a Signal Support Specialist assigned to Fort Campbell, KY from 2012-2015 and was deployed to Afghanistan in 2013 for a period of nine months. *(Testimony of Appellant)*
2. The Appellant injured his back because of his duties as a radio operator, wherein he was required to carry heavy equipment causing excessive strain on his back. He is considered a disabled veteran for civil service purposes and was coded as such on the eligible list and certification relevant in this appeal. *(Testimony of Appellant)*
3. In or about November 2015, the Appellant obtained a Class A Commercial Driver's License (CDL), which is a driver's license required to operate large, heavy vehicles within a certain weight in commerce, to include a tractor trailer. *(Testimony of Appellant)*
4. Within a year of leaving the Army in 2015, the Appellant began a civilian job at the Somerville Water Department in February 2016. His initial role at the Water Department was as a Special Heavy Machine Equipment Operator (SHMEO). *(Testimony of Appellant)*
5. As part of his responsibilities, the Appellant would operate large machinery, such as City dump trucks, front end loaders, forklifts, compressor trucks, box trucks, and backhoes. *(Testimony of Appellant)*

6. The Appellant's supervisor as a SHMEO was Mark Nolan, who has since retired as of the time of the Appellant's application to the Somerville Fire Department. (*Testimony of Appellant*)
7. The Appellant's current position with the Somerville Water Department is Head Meter Technician. He works alone in this role, unlike his position as a SHMEO, and his supervisor is Jean Argiulo, who is the Billing Analyst. (*Testimony of Appellant; Resp. Ex. 3*)

2016 – Appellant Sent Home for Percocet Use by SHMEO Supervisor

8. In December 2016, eight months after being hired by the Water Department, the Appellant “tweaked his back” at work one day and went to the emergency room that evening where he was prescribed Percocet and a muscle relaxer.⁴ The Appellant recalled that his injury was “not that serious” and that he did not file a workers compensation claim. (*Testimony of Appellant*)
9. According to the Food and Drug Administration (FDA)'s website, Percocet is a blend of Oxycodone (opioid pain reliever) and Acetaminophen (non-opioid pain reliever). Percocet is the brand name of this generic blend and is a morphine-like narcotic. The FDA advises that when Percocet tablets are no longer needed, the unused tablets should be destroyed by flushing them down the toilet, and that patients should be advised not to adjust the medication dose themselves but rather consult with their prescribing physician. Additionally, patients should be advised that Percocet tablets may impair mental and/or physical ability required for the performance of potentially hazardous tasks (e.g., driving, operating heavy machinery). (fda.gov) ([oxycodone and acetaminophen tablets, usp \(fda.gov\)](https://www.fda.gov/oc/ohrt/oxycodone-and-acetaminophen-tablets-usp-fda.gov))

⁴ No medical records of this incident were provided as evidence by the Appellant at the hearing before the Commission.

10. The following day after obtaining the prescriptions the night before, the Appellant reported for work at the Water Department, having taken the muscle relaxer that morning. The Appellant recalled that he is not sure whether he took a Percocet that morning. (*Testimony of Appellant*)
11. The Appellant informed Mark Nolan, his supervisor, and Stan Cote, the Commissioner of the Water Department, that he had the two prescriptions. He was immediately sent home from work and told to take a sick day. (*Testimony of Appellant*)
12. Commissioner Stan Cote made it clear to the Appellant that he should not come to work if he is taking Percocet or a muscle relaxer because it is unsafe to operate heavy machinery while on either prescription. He was not disciplined by his employer. (*Testimony of Appellant*)

2017- Appellant Issued Written Warning at Water Department

13. On or about October 12, 2017, the Appellant received a Written Warning of Unprofessional Conduct during working hours. Within the written letter addressed to the Appellant, the Deputy Director of Personnel informed the Appellant of the following:

“The Personnel Department has investigated personnel conflicts within the Water Department in recent months, and has concluded that you have been disrespectful towards both team members and supervisors in recent months. I am issuing this letter to let you know that this behavior is not only unacceptable but creates an untenable work environment for other employees.” (*Resp. Ex. 2*)

14. Specifically, the Personnel Department determined that the Appellant “openly and continuously chastises another employee about his performance, time and attendance.” (*Resp. Ex. 2*)
15. The letter warned the Appellant that he must respect the management structure in the Water Department, that he may not confront employees about their job performance, and that it is

inappropriate for him to take on supervisory responsibilities. Furthermore, he was told to address conflict in a professional and safe manner. (*Resp. Ex. 2*)

16. Additionally, the 2017 written warning states that the Appellant displayed “additional unacceptable behavior including taunting, talking back, allegations towards colleagues of incompetence, and other disrespectful actions.” (*Resp. Ex. 2*)

2018- Appellant Failed Drug Test at Water Department

17. On or about April 4, 2018, the Appellant was selected for random drug screening in accordance with his collective bargaining agreement and the City’s policies and procedures. (*Resp. Ex. 2*)

18. On or about April 18, 2018, the City was notified of a “positive dilute” as a result of the random drug screening that took place on April 4, 2018. The City immediately placed the Appellant on unpaid administrative leave in accordance with his collective bargaining agreement. He was required to remain on unpaid leave until he met with a Substance Abuse Professional (SAP), completed the suggested treatment plan, and was certified by the SAP as being able to return to work. The Appellant was on unpaid leave from April 18, 2018 to May 15, 2018. (*Resp. Ex. 2 and 3*)

19. In the April 18, 2018 Administrative Leave Notice sent to the Appellant, the City stated:

“Your job requires that you operate heavy machinery, and that you are in situations that require your utmost attention, awareness and care. The City must be assured that when you are at work, you are not under the influence of drugs or alcohol. Any future positive tests will be subject to progressive discipline as outlined by SMEA Unit B Appendix C...” (*Resp. Ex. 2*)

20. The Appellant had taken a Percocet on the Sunday before the Wednesday, April 4, 2018 random drug test. He took a sick day on that Monday, returned to work on Tuesday, and was subjected to a random drug test on Wednesday of that week. (*Testimony of Appellant*)

21. At the time he took the Percocet, the Appellant's 2016 prescription had expired. After he injured his back during a hockey game on a Saturday or Sunday night in 2018, the Appellant took a Percocet that remained from his 2016 prescription and called in sick on Monday.

(Testimony of Appellant)

22. The Appellant did not inform his supervisor that he recently had taken the Percocet when he arrived at work on that Tuesday. He did not inform his supervisor that had recently taken Percocet when he went to work on Wednesday, nor did he tell his supervisor he took a Percocet when he was told to undergo a random drug test that same day. It was only after he was told that he failed the drug screen on April 18, 2021, that he informed his supervisor, Mark Nolan, that he had taken the Percocet. *(Testimony of Appellant)*

Appellant's Candidacy for Somerville Fire Department

23. On or about March 24, 2018, just one month prior to his failed drug test, the Appellant took the civil service examination for Reserve Firefighter and received a score of 97. *(Stipulated Fact)*

24. On or about September 1, 2018, the Commonwealth's Human Resource Division (HRD) established a list of eligible candidates for Somerville Reserve Firefighter. *(Stipulated Fact)*

25. On October 2, 2019, HRD sent Certification No. 0068 to the Somerville Fire Department at the request of the Department; the Appellant was ranked fourth among those candidates willing to accept appointment. *(Stipulated Fact)*

26. The hiring process for this certification began in October 2019. The Appellant came in and signed the list, indicating that he was willing to accept employment with the Department should he be offered a position. *(Testimony of Breen; Resp. Ex. 1)*

27. The Appellant completed the written application provided to him by the Somerville Fire Department on or about October 9, 2019; however, the entire hiring process stalled soon thereafter, upon the onset of COVID in early 2020. (*Testimony of Breen; Resp. Ex. 3*)
28. In February 2021, Chief Charles Breen pushed for the hiring process to resume since there were many vacancies to fill due to retirements. (*Testimony of Breen*)
29. Charles Breen is the Fire Chief (referred to as “Chief Engineer”) of the Somerville Fire Department. He began his fire career in 1985 as a Firefighter. He was promoted to Lieutenant in 1992, Captain in 1996, Deputy Chief in 2012, Chief of Operations in 2015, and ultimately Fire Chief in 2018. In addition to running the day-to-day operations of the Department, Chief Breen also supervises the Department’s hiring process and sits on the hiring panel. Chief Breen chose Christopher Major to be his Assistant Chief and to be a member of the hiring panel. Assistant Chief Major is a veteran. (*Testimony of Breen; Major*)
30. As part of the Appellant’s application process, a background investigation was undertaken by Detective Michael Faria of the Somerville Police Department. Detective Faria reviewed the contents of the Appellant’s completed application and all documents that the Appellant was required to produce, to include his credit history. Detective Faria, pursuant to a release signed by the Appellant, also obtained the Appellant’s driver history and ran his criminal history (none existed). He also contacted the Appellant’s personal references, employment references, neighbors, and family members. (*Testimony of Faria; Resp. Ex. 2 and 3*)
31. Detective Michael Faria has been employed by the Somerville Police Department for 13 years and has been assigned as a detective for the past six years. In addition to general detective work conducted at crime scenes, Detective Faria also undertakes background investigations for persons applying for positions within the City of Somerville. He has

undertaken 10-15 prior employment background investigations for both police and fire department hires. The Detective's role is to uncover the facts relative to each candidate assigned to him, not to give a recommendation to the hiring panel.⁵ (*Testimony of Faria*)

32. On or about December 4, 2020, Detective Faria conducted a home visit at the Appellant's Somerville apartment to discuss the Appellant's application in detail, to answer any questions the Appellant had, and to observe where the Appellant resides. (*Testimony of Faria*)

33. During the December 2020 home visit, the Detective discussed the Appellant's credit history with him relative to an apartment he rented and how his account ended up in collection status. The Appellant told the Detective that, after he moved out of that apartment, the management company added a cleaning fee that the Appellant was unaware of, so it went to collection. He has since paid the fee. (*Testimony of Faria; Resp. Ex. 2; App. Post Hearing Ex. - receipt*)

34. During the home visit, Detective Faria and the Appellant discussed the Appellant's 2018 failed drug test, which the Appellant had noted in his application. The Appellant explained to the Detective that a year prior to the failed drug test, he was prescribed Percocet for back pain in 2016 and did not realize that the prescription for narcotics was only good for one year. The Appellant did not inform the Detective that he had been sent home from work by his supervisors just one year prior to this failed drug test in 2016 for coming to work while having taken Percocet and a muscle relaxer. (*Testimony of Faria; Resp. Ex. 2*)

⁵ Detective Faria was not initially assigned to the Appellant's background investigation in 2019, when the Appellant first turned in his application. The detective was assigned the Appellant's case in late November/ early December 2019 and was given just three (3) days to complete his investigation. Typically, the Detective has been allotted one (1) to (2) months for an employment background investigation. (*Testimony of Faria*)

35. Additionally, Detective Faria asked the Appellant about an incident that the Appellant noted in his application relative to an altercation he had at work with a co-worker in 2017. The Appellant told the Detective, as he had written in his application, that it was simply a verbal argument with one co-worker and that the co-worker did not like what the Appellant said to him, so he filed a report against the Appellant. (*Testimony of Faria; Resp. Ex. 2*)
36. As part of his investigation, the Detective obtained the Appellant's Written Warning for Unprofessional Conduct (Written Warning) that was part of the Appellant's personnel file. The Detective concluded that the Written Warning referenced additional misconduct that the Appellant did not reveal to the Detective during the home visit, based on the reference in the warning to the Appellant being disrespectful and unprofessional to various members of the Water Department, including other co-workers and supervisors, over a period of months. The Detective obtained this document after the home visit.⁶ (*Resp. Ex. 2*)
37. As part of the background investigation, a Massachusetts and Florida driver history was run by the Detective. The Department pays particular attention to those entries on the driver history that occurred within the last five years, as the Department considers those entries to be the most relevant. (*Resp. Ex. 2; Testimony of Faria; Breen; Major*)
38. A review of the Appellant's driver history from 2016-2021 revealed two at fault motor vehicle accidents (2016, 2017) and two speeding tickets (2016 and 2018). The Appellant was found Not Responsible for the 2016 speeding ticket. Chief Breen testified that the

⁶ The Detective did not follow up with the Appellant regarding the discrepancy in his story and what the document states. He believes he would typically have done so, but given the deadline he was under, he believes that is probably why he did not follow up. (*Testimony of Faria*) The Appellant was asked about the discrepancy between his story and what the Written Warning details during his February 2021 panel interview following the December 2020 home visit. (*Testimony of Breen; Major; Appellant; Resp. Ex. 6*)

Department focused on the two motor vehicle accidents (2016, 2017) and the one speeding ticket that he was found Responsible for (2018) as the most concerning elements of the Appellant's driver history. (*Resp. Ex. 2; Testimony of Breen; Major; Faria*)

39. Lastly, the background investigation revealed two entries in the Appellant's credit history that were noteworthy to the Department, including a charge-off from a jeweler in 2013 with a balance of \$2,069 and a balance from a cleaning company from 2015 that went to collection, which was ultimately paid in 2018. The Detective spoke to the Appellant about the cleaning bill that went to collection during the home visit. Both issues on the credit report (the cleaning bill and the jeweler) were discussed with the Appellant more in depth during the interview panel with Chief Breen. (*Resp. Ex. 2, 5, and 6; Testimony of Breen; Major; Faria*)

Interview Panel February 2021

40. In February 2021, the Somerville Fire Department undertook interviews of all eligible candidates from the certification for the position of reserve firefighter. All interviews were undertaken by Chief Breen, Assistant Fire Chief Major, and former Chief of Staff to the Mayor, Janice Delory. All interviews were audio recorded. Prior to each interview, all panel members reviewed each candidate's history, to include their background investigation, their application, credit history, driver history, etc. (*Testimony of Breen; Major*)

41. Each candidate is asked questions relative to their specific application and background investigation. Following this discussion, each candidate is asked a set of predetermined, uniform questions. The three panel members took notes on every candidate's answer to the set questions. Following each interview, the panel members also jotted down notes about what their thoughts were about each candidate, most especially about their impression of them and any concerns. (*Testimony of Breen; Major; Resp. Ex. 4 and 6; App. Ex. 3 and 5*)

42. During the Appellant’s interview, he was asked specifically about his motor vehicle driver history, which revealed two at-fault accidents in the past five years – 2016 and 2017. He confirmed that he had been in those two accidents, which he described as minor accidents involving backing up into a car in a parking lot causing an accident (2016) and rear ending a vehicle while in traffic after following too closely (2017). Detective Faria did not obtain any documents relative to the circumstances of the Appellant’s motor vehicle accidents. Additionally, the Appellant confirmed that he had received a speeding citation in 2018 on Route 93, which also appeared on his driver history. (*Testimony of Appellant; Breen; Major; Resp. Ex. 4 and 6*)
43. The interview panel was concerned with the two at-fault motor vehicle accidents and the recent speeding—all of which occurred within the last five years—as firefighters drive engine trucks (carrying up to 500 gallons of water) and ladder trucks (up to 60 feet long) that are not easy to stop. Furthermore, Somerville is a very urban, dense city that can be difficult to maneuver around, especially in an emergency going at a higher rate of speed.⁷ (*Testimony of Breen; Major; Resp. Ex. 4 and 6*)
44. During the Appellant’s interview, he was also asked about his credit history, including the cleaning bill and the charge off to the jeweler. When asked, the Appellant seemed fully aware of the cleaning bill collection issue, which he had already paid off. The panelists, however, were caught by surprise by the Appellant’s confusion when they brought up the charge-off to the jeweler on his history. (*Testimony of Breen; Major; Resp. Ex. 4 and 6*)

⁷ Assistant Chief Major noted that these are not the only entries on the Appellant’s driver history, which was concerning to him because the Appellant has accrued driving violations throughout his driving history – both before and after his service in the military. (*Testimony of Major*)

45. When the Appellant was asked if he was aware of the charge-off to the jeweler, he said he was not. The panel gave him the documents that the Appellant had provided to the Detective during his background investigation. The Appellant looked quietly at the document for a few moments and then stated, "Um, I'm not sure." He said that the dates coincided with his wedding rings and that he thought his ex-wife had paid for them during his deployment.

(Resp. Ex. 4 and 6)

46. The Appellant was asked if he looked at the documents, which he had provided to the Detective, and he acknowledged that he had not looked through the credit information prior to passing it in. This lack of attention to detail was of concern to Chief Breen who believed it showed that the Appellant was not taking the process as seriously as he should have been.

(Testimony of Breen; Major; Resp. Ex. 4 and 6)

47. The interview panel also discussed the Appellant's work history with him during the interview, to include the 2017 Written Warning and the 2018 Failed Drug Test. Unlike during the December 2020 home visit with the Detective, who had not yet obtained the actual Written Warning from Personnel, the interview panel did have the document by then.

(Testimony of Breen; Major; Resp Ex. 4 and 6)

48. The panel allowed the Appellant to explain his understanding of events relative to the 2017 Written Warning and, when finished, then asked him to explain the possible discrepancy between the version he gave at the home visit and in this interview (which only involved one co-worker) and the Written Warning itself, which indicated that he has had been disrespectful to *both* (other) team members *and* supervisors in recent months. When asked, the Appellant confirmed that Personnel read the contents of the warning to him in 2017, that he signed the document, and that when he signed, he was aware of what it alleged; however, he maintained

that there was only one incident with the co-worker who reported it one month after it occurred. During his testimony, the Appellant stated that he did not grieve the discipline.

(Testimony of Appellant; Breen; Major; Resp. Ex. 4 and 6)

49. Assistant Chief Major contacted the Personnel Department for the City to inquire about the contents of the Written Warning following the interview. He spoke with Ellen Collins, the Deputy Director of Personnel. Deputy Director Collins signed the 2017 Written Warning that was issued to the Appellant. She confirmed that the document was accurate and legitimate.⁸

(Testimony of Major; Resp. Ex. 2)

50. Lastly, the Appellant was asked about the 2018 positive drug test during the interview. He was given the opportunity to explain his version of events. He explained that he had actually been sent home over a year prior (2016) for having reported to work having taken a muscle relaxant (and possibly a Percocet). He explained during the panel interview that he had taken a day off from work in April 2018 (a Monday), because he hurt his back the day before. He said he went back to work on Tuesday and was then randomly drug tested on Wednesday. He acknowledged that he had taken a Percocet and that he failed the drug test. The Appellant told the panelists that he had taken one Percocet that he still had from a year and four months prior – when he previously had injured his back and had been sent home by his supervisor. He claimed he did not realize the prescription had expired and thought he could take it on an “as needed” basis. *(Testimony of Appellant; Resp. Ex. 4 and 6)*

51. Once all candidate interviews were complete, the three-member panel met to discuss each candidate, detailing the pros and cons. The panel does not score the interview answers, nor

⁸ The Appellant’s proposed decision incorrectly states that Deputy Personnel Director Ellen Collins did not have knowledge of the incident and that she did not sign the Written Warning. *(Resp. Ex. 2)*

do they rank the candidates following the interviews; rather, the panel comes to a consensus.⁹
The next step was for the panel to meet with the Mayor, the Appointing Authority.

(Testimony of Breen; Major)

52. Present during the discussion with Mayor Joseph Curtatone was the Mayor's Chief of Staff, a representative of the City Law Department, the three panelists, and a representative from the City's Human Resources Department. Following a discussion about each candidate, the Mayor adopted the panelists' recommendation. At no time after this meeting did the panelists discuss any candidate with the Mayor. Human Resources drafted the bypass letters of those candidates not selected for appointment. The Chief and the Assistant Chief reviewed the letters for accuracy. *(Testimony of Breen; Major; Resp. Ex. 5)*

53. By letter dated March 11, 2021, the Mayor of Somerville, Joseph Curtatone, the Appointing Authority, notified the Appellant that the City was bypassing him for appointment, citing the Appellant's driver history, credit history, failed drug test, his prior discipline and the interview panel's conclusion that he may not have been forthcoming about the full extent of his discipline. *(Stipulated Fact; Resp. Ex. 5)*

54. Of the ten candidates that were selected for appointment by the City, ten were ranked below the Appellant. *(Stipulated Fact)*

55. On or about April 12, 2021, the Appellant filed an appeal of the City of Somerville's decision to bypass him for appointment to the Civil Service Commission. *(Stipulated Fact)*

⁹ The Commission has consistently held that such "consensus scoring" is not ideal as it does not allow a reviewing agency such as the Commission to determine how each of the panelists, prior to a group discussion, rated a particular applicant. Maintaining independent scores or rankings related to each panelist allows for such a review and reduces any undue subjectivity in the process. While this was a defect in the process here, which should not be repeated on a going-forward basis, it does not change my ultimate opinion regarding whether the review process, overall, was fair, thorough, and impartial.

Candidates Who Bypassed Appellant

56. Candidate 1 is a 2009 high school graduate and is a current resident of Somerville. He is in the service industry, has no at-fault motor vehicle accidents, a good credit history, and has never been disciplined at work. His uncle and cousin are firefighters in the Somerville Fire Department. (*App. Ex. 1, 2, 3, 5*)
57. Candidate 2 is a 2008 high school graduate and has a bachelors and master's degree. His driver history reveals no at-fault accidents. He has no history of discipline at work and has no credit issues. One of his uncles works for the Somerville Police Department, another uncle works for the Department of Public Works, and he personally knows two Somerville firefighters. (*App. Ex. 1, 2, 3, 5*)
58. Candidate 3 is a firefighter for another City. He obtained a bachelor's degree and was the captain of the men's college basketball team. He does not have any at-fault motor vehicle accidents within the last five years. His first year of college, he was fired by his employer, Shaw's Supermarket, after having been with a group of friends inside another Shaw's and one of his friends stole a deodorant. He has no relatives who work for the City and does not know any Somerville firefighters. (*App. Ex. 1, 2, 3, 5*)
59. Candidate 4 has been a firefighter in another Fire Department since 2018. He is a minor league professional sports player and obtained a bachelor's degree. He is working towards his Master's Degree in Mental Health Counseling. While employed in the other Fire Department, he was awarded the Service Award in 2020 for outstanding patient care/treatment and the Outstanding Teammate Award, voted on by his peers upon graduation from the Fire Academy. He is a fully certified EMT, has a good credit history, and his driver history has a 2017 entry for Speeding and Disobeying Traffic Sign. This candidate's uncle is

on the Somerville Board of Health and he knows three Somerville firefighters. (*App. Ex. 1, 2, 3, 5*)

60. Candidate 5 is a Certified Public Accountant and is the lead global accountant at his current employer. He is 2011 Summa Cum Laude graduate of a college in Massachusetts. His driver history reveals no at-fault accidents in the last five years and there is one entry of Speeding in 2019. In his application, he indicated that he was “terminated” from a prior job because his company relocated abroad. However, upon discussion about this job history with the interview panel, he realized that he should have used the term “laid off” instead of “terminated” because the the company was unable to continue to employ him, through no fault of his own. There was no misconduct, and he was not being disciplined when he was laid off.¹⁰ This candidate has no relatives who work for the City and knows no Somerville firefighters. (*App. Ex. 1, 2, 3, 5*)

61. Candidate 6 is a 2008 graduate of Somerville High School and earned a bachelor’s degree in 2015. He is a musician who plays the guitar and first worked in the field of audio-visual technology in broadcasting. He since changed career paths and became a finish carpenter, working with his father who is a general contractor, and he has invaluable knowledge of the structure of new and old buildings as result of his work in carpentry. He has one at-fault accident in the past five years—a 2019 accident where he rear-ended someone at a rotary entrance. He is a certified EMT, but is not licensed. He has a fair credit history, with past issues involving student loans and one medical bill, but he is all caught up on his payments.

¹⁰ In his notes, Captain Breen wrote that this candidate had a “very good interview” and “brings a different perspective to the job.” (*Resp. Ex. 4*)

He has a brother on the Somerville Police Department and he knows one Somerville firefighter. (*App. Ex. 1, 2, 3, 5*)

62. Candidate 7 is a 2013 college graduate and was captain of his college football team.

Following graduation, he has played in the Arena Football League on three 3 different teams. He is CPR certified, has a CDL license, and currently works as a SHMEO for the Water Department for the City. He has no prior disciplinary history at work, has been the Employee of the Year at a prior employer, has a 2016 at-fault accident (his car door hit another car door in a parking lot), and had an issue on his credit history regarding an unpaid student loan that he has been paying regularly since. This candidate has no relatives who work for the City and he knows five Somerville firefighters. (*App. Ex. 1, 2, 3, 5*)

63. Candidate 8 is a 2017 graduate of Somerville High School. He has been a member of the Somerville Auxiliary Fire Department since 2018. He is fluent in Spanish and Portuguese, has no credit issues, no at fault motor vehicles in the last five years, and was reprimanded at work for being late once for one shift as a waiter. In high school, he was suspended from school for three days for taking a Xanax with his friends and showed deep regrets for his actions during his interview. This candidate has no relatives who work for the City, nor does he know any Somerville firefighters. (*App. Ex. 1, 2, 3, 5*)

64. Candidate 9 has a 2018 Bachelor of Arts degree in Criminal Justice. He is currently a Security Guard at a local hospital and has an Emergency Medical Response (EMR) Certificate. He has no entries on his driver history, no credit issues, and no prior discipline at work. His late father was a longtime Somerville Firefighter and in his panel interview, he stated, "I want to earn [this] and do it for myself." This candidate indicated that he has no relatives who presently work for the City and wrote in his application that there "are too

many to list” with regards to how many Somerville firefighters he knows. (*App. Ex. 1, 2, 3, 5*)

65. Candidate 10 has been a firefighter in another Fire Department since 2017 and was previously an on-call firefighter for a different Town. This candidate is a paramedic who has worked for a private ambulance company, having worked closely with the Somerville Fire Department in that role. The candidate is a 2012 high school graduate and obtained an associate’s degree. The candidate’s background investigator notified her about a medical bill that had not been paid that appeared on her credit report, of which the candidate was unaware (due to an address change) and which was paid immediately. The candidate has no prior work discipline, and the driver history for the past five years indicates no moving violations or at-fault motor vehicle accidents. This candidate has no relatives who work for the City and knows one Somerville firefighter. (*App. Ex. 1, 2, 3, 5*)

66. The Appellant’s uncle is the Deputy Fire Chief for the Somerville Fire Department and he knows an additional three Somerville firefighters. (*Resp. Ex. 3*)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit

standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge, supra, at 304.

In order to deviate from the rank order of preferred hiring and appoint a person “other than the qualified person whose name appears highest”, an appointing authority must provide written reasons – positive or negative, or both – consistent with basic merit principles. G.L. c. 31, §§ 1 and 27; PAR.08. A person who is bypassed may appeal that decision under G.L. c. 31, § 2(b) for a de novo review by the Commission to determine whether the bypass decision was based on a “reasonably thorough review” of the background and qualifications of the candidates’ fitness to perform the duties of the position and was “reasonably justified”. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012), citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006), and cases cited; Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

Analysis

The Appellant has much to be proud of, beginning with a distinguished military career in the United States Army that included nine months of active duty in Afghanistan. Further, his decision to continue with a career in public service in the City’s Water Department is commendable. I carefully reviewed the audio / video recording of the Appellant’s testimony before the Commission. I found him to be a credible witness. He took his testimony seriously and was careful to ensure that his answers were accurate and consistent with his memory of events.

The references in the bypass letter alleging that the Appellant has provided incomplete or inconsistent information during the interview process are not supported by the record.

Specifically, there was insufficient evidence to show that the Appellant's (non-drug test) prior discipline involved multiple incidents with multiple employees and supervisors. I recognize that the warning letter, which was signed by the Appellant, makes a general reference to such incidents, but the lack of specificity, along with the Appellant's credible testimony, leads me to conclude that the (non-drug test) discipline primarily centered around one minor incident with one other employee. Thus, the City's conclusion that the Appellant was not forthcoming about this incident was not supported by a preponderance of the evidence and is not a valid reason for bypass. I also credit the testimony of the Appellant that he had simply overlooked, or was unaware, that he had a charge-off on his credit report related to the purchase of a wedding ring. To ensure clarity, any appointing authority seeking to tie a relatively minor charge-off on a credit report to a candidate's fitness to serve as a firefighter faces a high hurdle before the Commission. Nuanced questions regarding whether, or when, a candidate was aware of this minor entry on a credit report, seem far afield from what a Fire Chief should be inquiring about to determine a candidate's fitness for duty as a firefighter. For these reasons, I do not find any reason associated with the Appellant's credit report to be a valid reason for bypass.

The Appellant's driving history is a closer call. The Commission has consistently held that stale driving infractions, particularly those that may be more attributable to socioeconomic factors than anything else, are not a valid reason for bypass. Here, the Appellant had two relatively recent surchargeable accidents and one speeding ticket for which he was found responsible. The City has sufficiently shown this to be a valid reason for bypass as there is a reasonable nexus between the Appellant's negative driving history and his ability to drive large fire apparatus through the congested streets of a densely-populated City.

I now turn to the most substantive issue involving this appeal, the Appellant's relatively recent failed drug test while employed by the City's Water Department. The Appellant was well aware of the sensitive nature of his positions in the Water Department, including the associated regulations regarding the use and reporting of pain medication. By the Appellant's own testimony, he went to work in April 2018 as a Special Heavy Machinery Operator (SMHEO) for the City of Somerville while he had Percocet in his system. Just a year and half prior, he had been warned how dangerous it was for him to be at work with Percocet (and muscle relaxers) in his system. He was sent home by the Commissioner of the Water Department in 2016 and told to never come to work having taken Percocet. Because he was forthright with his supervisors, the Appellant was not disciplined in 2016. However, in April 2018, the Appellant did not inform his supervisor that he had taken Percocet and gone to work two days later. It was only after the positive drug test that he reported taking Percocet to his supervisor. While I credit the Appellant's testimony that he took the one remaining (of 10) Percocet tablet that had been prescribed to him, the undisputed fact is that the prescription had expired months ago. Given the sensitive nature of the Appellant's position in the Water Department, he had a heightened responsibility to: a) follow all instructions related to this prescriptions (no usage after the expiration date without a further prescription); and b) promptly notify his supervisor that he had taken the Percocet. His failure to do either was a serious error and is a valid reason for the City to bypass him for appointment as this time.

I am unpersuaded by the Appellant's argument claiming that the facts here are on the same footing of Candidate 8, who was suspended from high school as a teenager for having taken a Xanax on one occasion, as Candidate 8 was not expected to operate heavy machinery at his place of employment the day that he took the pill. Further, after reviewing Candidate 8's

entire application, background investigation, and the audio of his interview, the evidence shows that this lapse in judgment (as a teenager) was an isolated incident. Candidate 8 has never been disciplined at work for failing a drug test; his driver history shows no at-fault accidents; and he has an unblemished record as an auxiliary firefighter.

In his proposed decision, the Appellant also attempts to lump five candidates who bypassed him, each of whom had admitted to having smoked marijuana in the past, under the same tent as the Appellant. Like the five who admitted to marijuana use, the Appellant himself admitted to marijuana use in his past, saying he “hung around with a bad crowd.” The differentiator between the five who admitted to marijuana use and the Appellant is that these five do not have a failed drug test (for narcotics) while on duty at their job in their history, unlike the Appellant who does have that in his background.

I am also unpersuaded by the Appellant’s argument that the City unfairly chose two other candidates who had previously been terminated by an employer, which he argues is much worse than the Written Warning he received. Candidate 5, a Certified Public Accountant, wrote in his application that he had been “terminated” by a previous employer because the company relocated to another country. The interview panel was concerned that he had been terminated so they discussed it with Candidate 5 at his panel interview. A review of the recorded interview makes it clear that Candidate 5 should have written that he was “laid off.” The confusion was cleared up immediately.

The other candidate who indicated that he was terminated from a prior job was Candidate 3. Candidate 3 is currently a firefighter in another City. In 2013, during his first year of college (8 years ago), he was with a group of friends inside a Shaw’s Supermarket in Boston. His friend stole a deodorant and loss prevention saw it on video. Candidate 3 told loss prevention that he

worked at a Shaw's near his home. No police were called. Within a couple days, Shaw's contacted his mother to tell him he was terminated from employment. The City clearly did not find this fact pattern to be disqualifying for Candidate 3 to becoming a Somerville firefighter, especially taken in conjunction with the entirety of his background investigation. In his interview, Candidate 3 plainly explained the circumstances, showed remorse, and persuasively explained what he learned from the incident. Furthermore, Candidate 3, unlike the Appellant whom he bypassed, does not have a problematic driver history and no past drug test failures.

More broadly, as the detailed account of the backgrounds of the selected candidates shows, each of the selected candidates have overall commendable records that show that their selection was consistent with the requirements of a merit-based system.¹¹

In summary, the reasons associated with the Appellant's failed drug test and his recent driving history are valid reasons to bypass the Appellant for appointment; the other reasons are not; and there was no showing that the decision here was based on bias, favoritism or any other impermissible reason. With the passage of time, however, assuming a continued, future employment history free of discipline and a driver history free of further moving violations, the City may well have a more difficult time in a future hiring cycle showing the nexus between these reasons and his fitness for duty as a firefighter.

¹¹ I have not overlooked the Appellant's argument that his non-selection may be associated with his veteran status. Based on the credible testimony of the City's witnesses, including the Assistant Fire Chief, who is a veteran, I do not believe veteran status was a factor.

Conclusion

For all of the above reasons, the Appellant's bypass appeal under Docket No. G1-21-080 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on October 20, 2020.

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:
Leah Barrault, Esq. (for Appellant)
Jason Piques, Esq. (for Respondent)