

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

SCOTT BACON,
Appellant

v.

G1-17-075

CITY OF HOLYOKE,
Respondent

Appearance for Appellant:

Shawn P. Allyn, Esq.
Allyn & Ball, P.C.
480 Hampden Street, 1st Floor
Holyoke, Massachusetts 01040

Appearance for Respondent:

Tasha Marshall, Esq.¹
City of Holyoke Law Department
20 Korean Veterans Plaza
Holyoke, MA 01040

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Scott Bacon (hereinafter "Mr. Bacon" or "Appellant"), filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on April 21, 2017, under G.L. c. 31, s. 2(b), appealing the decision of the Fire Commissioners of the City of Holyoke (hereafter "Respondent") to bypass him for appointment to the permanent, full-time position of firefighter. A prehearing conference was held in this case on May 10, 2017 at the State Office Building in Springfield.² A full hearing was held on the appeal on July 26, 2017 at the same location. Having not received a written request for a public hearing, the hearing was private.

¹ Attorney Kevin C. Maynard previously represented the Respondent.

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

The hearing was digitally recorded and copies of the recording were sent to the parties.³ All witnesses, with the exception of the Appellant, were sequestered. After the hearing, the Appellant asked to call additional witnesses, add exhibits and opposed the documents submitted in response to my order at the hearing. A ruling on August 22, 2017 denied the request for additional testimony and admitted the parties' post-hearing documents. The Appellant noted his opposition to the ruling. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Twenty-two (22) Exhibits were entered into evidence at the hearing.⁴ Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- John Pond, Chief, Holyoke Fire Department (HFD)
- Michael Boucher, Lieutenant, Professional Standards Division, HFD

Called by the Appellant:

- Scott Bacon (Appellant)

³If 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, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

⁴The exhibits entered into the record at the hearing include Respondent's Exhibits (R.Ex.) 1 through 13 and Appellant's Exhibits (A.Ex.-) 1 through 9. In response to my order at the hearing, the Respondent produced post-hearing the partial applications of the selected candidates (using the candidates' initials); the applications of the candidates (using candidates' initials) who bypassed the Appellant; the investigation reports of the candidates (using candidates' initials) who bypassed the Appellant; a letter from Fire Commissioner Joshua Garcia dated August 23, 2017; the minutes of the Jan. 25, 2017 Board of Fire Commission meeting; an August 1, 2017 statement of a civilian member of the HFD; an affidavit of Personnel Director Kimberly Counter; and a Dec. 20, 2016 email exchange between the civilian HFD employee and a then-Assistant Solicitor (all cited as R.PH.Ex.-). I give limited weight to written statements submitted post-hearing by people who did not testify at the hearing. Post-hearing, the Appellant requested and was allowed (without objection) to submit two (2) screenshots allegedly of Lt. Boucher's Instagram account and profile, a screen shot allegedly pertaining to a fundraiser for a member of the Appellant's family, and a screen shot allegedly from Mayor Morse's Facebook account (cited as A.PH.Ex.-). The Appellant reported that he had filed a complaint at the State Ethics Commission regarding the Respondent's actions regarding his bypass. The complaint is not included in the record as Appellant's counsel expressed some concern about whether it constitutes a public record. However, on representation of counsel, I have no reason to doubt that the Appellant filed such a complaint. As with all evidence, the material included in the record post-hearing is given the weight it is due based on its reliability.

and taking administrative notice of all matters filed in the case; stipulations⁵; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. At the time of the Commission hearing, the Appellant was forty-eight (48) years old.⁶ (Testimony of Appellant) He took and passed the firefighter exam on April 16, 2016. He submitted a Residency Preference form for the examination, claiming residency in the City of Holyoke. (R.Ex. 2) The one (1)-year residency period required for residency preference for the 2016 firefighter exam was April 16, 2015 to April 16, 2016. (R.Ex. 10; *see* G.L. c. 31, s. 58)
2. The Appellant was born and raised in Holyoke. In or about 2014, he lived in Belchertown, where his child lives, and he shared custody with his ex-wife. In or about 2015, the Appellant was dating Ms. D, who lived in Longmeadow where her child attended school. (Testimony of Appellant) In April 2015, the Appellant's credit report indicated that he lived in Longmeadow at Ms. D's address. (R.Exs. 5 and 7 (p. 2) At various times in 2015 and 2016, the Appellant lived in Holyoke, he asserted, for financial reasons, to live with his sister, her husband and their three (3) children. The Appellant did not pay rent at his sister's home but he asserted that he paid for utilities, although the

⁵ At the prehearing conference in this case, the parties stipulated to certain facts. (Administrative Notice) In addition, the parties presented another stipulation at the full hearing. Specifically, Fire Commissioner Joshua Garcia was going to testify at the hearing but, during the hearing, he informed Respondent's counsel that a personal matter arose and he would not be able to testify. The parties stipulated that if Mr. Garcia had testified, he would indicate that the Fire Commission did not ask the Appellant about alleged omissions in filling out the application (regarding questions 26, 27, 28, 72 and 76), that references to such alleged omissions in the bypass letter would not suffice, on their own, as reasons to bypass the Appellant, that the Fire Commission did ask the Appellant about his residence in the one (1) year prior to the 2016 exam, and that they were informed that the Appellant had already provided his vehicle registration and voter registration in this regard to the HFD. (Digital Recording of Full Hearing at 2 hours, 50 minutes)

⁶ I take administrative notice that Holyoke is a civil service community that currently has no upper age limit for entry-level firefighters. (*See* <https://www.mass.gov/service-details/civil-service-fire-departments>; and <https://www.mass.gov/service-details/age-requirements-for-entry-level-public-safety-positions>)

utility bills are in the Appellant's sister's name, and that he performed maintenance but there was no documentation that the Appellant paid such bills or performed maintenance there. In or about the summer of 2015, the Appellant's sister became ill and the Appellant helped take care of her children. Ms. D and the Appellant were married in November 2015. (Testimony of Appellant; R.Exs. 3 and 4; Administrative Notice)

3. On December 12, 2016, the state's Human Resources Division (HRD) established a list of eligible candidates who passed the firefighter exam. On the same date, HRD established certification No. 04132 to fill ten (10) firefighter vacancies in Holyoke. HRD notified candidates on this Certification to indicate their interest in employment at the HFD on or before December 19, 2016 by signing the Certification. The Appellant's name was placed on the eligible list, ranked seventh (in a tie) as a non-veteran with residency preference in Holyoke. He signed the Certification. (R.Exs. 1 and 12) All of the candidates who signed the Certification had claimed Holyoke preferences when they took the examination. (Testimony of Pond; R.Ex. 1)
4. On or about December 17, 2016, the Appellant submitted an application for employment as a Holyoke Firefighter.⁷ (R.Ex. 3)
5. The first page of the application includes instructions stating, in part, "deliberate misstatements or omissions can and often will result in your application being rejected." (R.Ex. 3) Each page of the application must be initialed to indicate that the applicant has "provided complete and accurate information." (Id.) Section 11 further instructs

⁷ The application form requests, among other things, the candidates' record of driving citations. Candidates referenced herein generally did not provide responses. Further, I note that the background investigation checklist that the HFD investigators use included a section regarding the candidates' driving records but that the two (2) HFD investigators checked off that the driving records were "negative" (meaning, apparently, that there was nothing of concern therein) and did not list "any significant items" on the checklist in the space provided regarding the candidates' driving records. (*See* R.PH.Exs. – Applications and Investigation reports)

applicants to certify that they have personally completed and initialed each page and certify that “all statements made are true and complete to the best of my knowledge and belief” and that “any misstatement of material fact may subject me to disqualification; or, if I have been appointed, may disqualify me from continued employment.” (Id.)

6. The Appellant completed section 2 of the application, which asks for certain contact information for immediate family relatives. In response, the Appellant identified his spouse as Ms. D, writing that her address was the same address in Holyoke as the address of the Appellant, who was living with his sister and her family. (R.Ex. 3)
7. Beginning in December 2016, Lt. Michael Boucher, in the HFD Professional Standards Division (PSD), conducted a background investigation of the Appellant. (R.Exs. 4 – 8) Previously, a civilian member of the HFD would call candidates’ references and check their residences for background checks. However, because of prior candidate residency problems, the HFD changed its process so that during this hiring cycle, uniformed members of the HFD Professional Standards Division began conducting the background checks using the process used by the Holyoke Police Department (HPD). (Testimony of Pond)
8. As part of this investigation, Lt. Boucher kept a “Background Investigation checklist” form, which contained fields to document the dates that information in the application was verified, for example, by completing reference checks, completing records checks, dates of examinations, home visits, other actions to verify information, and conducting a discretionary interview to address discrepancies as appropriate. (R.Ex. 8; Testimony of Boucher)

9. On December 22, 2016, Lt. Boucher sent correspondence to the Appellant's personal, employment and landlord references requesting that the references complete the pertinent verification or reference form. (R.Ex. 8; Testimony of Boucher) The landlord verification reference form does not include an attestation, it is not signed under pains of penalty and it does not require notarization. (Administrative Notice) The Appellant's sister received a landlord verification form, filled it in, signed it and submitted it to the HFD. (R.Ex. 4)
10. On or about January 11, 2017, Lt. Boucher obtained the Appellant's credit report, which reported the Appellant's residence at Ms. D's address in Longmeadow as of April, 2015. (R.Ex. 7; Testimony of Boucher))
11. Also on or about January 11, 2017, Lt. Boucher obtained a copy of a Property Card from the Town of Longmeadow, which indicated that Ms. D is the owner of the property at the Longmeadow address in the Appellant's credit report and she purchased the property in 2010. (R.Ex. 5)
12. On January 14 and 15, 2017, at different times of day, Lt. Boucher attempted to visit the Appellant at the Holyoke address listed in the Appellant's application. At the first visit, Lt. Boucher spoke to the Appellant's brother-in-law, who said that the Appellant was at work. At the second visit, no one was there. (R.Ex. 8; Testimony of Appellant and Boucher)⁸

⁸ Lt. Boucher's background investigation report asserts that at one of the visits to the Holyoke residence, he encountered a neighbor who stated that the Appellant did not live in his sister's house. However, the Appellant alleged that this neighbor was someone who was biased against him. As no further evidence was offered regarding the neighbor, I do not rely on his reported statement.

13. During Lt. Boucher's background investigation of the Appellant, he also checked the Appellant's address in the online "White Pages", which indicated that the Appellant resides in Longmeadow. (Testimony of Boucher)
14. On January 17, 2017, Lt. Boucher conducted an interview with the Appellant to clarify his residency during the residency period, asking the Appellant for residency proof, such as documents of a mortgage, a lease, or a utility bill, which the Appellant did not provide. (R.Ex. 8; Testimony of Boucher) The Appellant provided his motor vehicle registration but it states only that the car was registered in Holyoke (no street name and number is visible on the registration) and that his registration was not effective until November 1, 2016, which is six (6) months after the 2016 firefighter exam and too late to support a claim of residency preference in Holyoke between April 2015 and April 2016. The Appellant also provided his voter registration information, which indicates, in part, that in 2014, the Appellant was registered to vote in Belchertown; on February 10, 2016, just a few months after he married Ms. D in November 2015, the Appellant switched his voter registration from Belchertown to his wife's home address in Longmeadow; and, two (2) months later, on April 13, 2016 (three (3) days prior to the 2016 firefighter exam), the Appellant changed his voter registration address from his wife's Longmeadow address to his sister's Holyoke address. (Testimony of Appellant; A.Ex. 3; R.Ex. 6)
15. On January 22, 2017, Lt. Boucher completed a Background Investigation Report (Report) indicating, in part, that the Appellant's claimed residency preference status could not be verified. (R.Ex. 8; Testimony of Boucher) Lt. Boucher also wrote, in part,

When mr. (sic) Bacon was given (sic) the opportunity to explain the discrepancy (sic) ... [he] stated he and his family lives (sic) with his sister at the [Holyoke] address provided but his wife wants to keep the house in Longmeadow so the kids (sic) can stay in school there. If he is hired they will sell the house, if not they will

move back there. When asked who lives in the Holyoke address with him he stated his brother in law (sic), sister, and their 3 children, himself, his wife and her son (R.Ex. 8)

16. In Holyoke, a three (3)-member Board of Fire Commissioners (Board) is responsible for appointing firefighters. (Testimony of Pond) On January 25, 2017, the Board was scheduled to conduct interviews of the candidates, including the Appellant. At that meeting, Fire Commissioner Garcia stated for the record that one (1) candidate was related to a civilian member of the HFD, adding that the civilian employee would not, and did not participate in her relative's interview; instead, someone else would take the appropriate notes during her relative's interview. The civilian employee took notes during the other candidates' interviews. (R.PH.Ex. – Fire Commission minutes) At the Appellant's Board interview, the Board asked about his residence, requesting his voter registration and motor vehicle registration, which the Appellant had already given to Lt. Boucher. (Stipulation) After the interviews, the Fire Commission voted to hire ten (10)⁹ candidates, three (3) of whom were ranked above the Appellant on the Certification, seven (7) of whom were ranked below the Appellant. The Fire Commission also voted to bypass six (6) of the candidates. Of the six (6) candidates who were not selected, three (3) of them (including the Appellant) were not selected because their residency between April 2015 and April 2016 had not been verified. (Id.; R.PH.Ex. – Investigations)
17. Of the ten (10) candidates who were selected, four (4) are related to other City of Holyoke employees; three (3) of the four (4) selected candidates who are related to other City of Holyoke employees bypassed the Appellant. Family members of three (3) of the four (4) selected candidates work at HFD. The family relation of the fourth of such

⁹ One (1) of the ten (10) selected candidates who bypassed the Appellant apparently declined the employment offer and the Respondent subsequently selected another candidate who also bypassed the Appellant. (August 23, 2017 email)

candidates is a member of the Holyoke Police Department. (R.PH.Ex. – Affidavit of Acting Personnel Director¹⁰; R.Ex. 1) There is no evidence in the record that members of the HFD who are related to two (2) of the selected candidates were involved in the selection process, nor is there any indication in the record that the selected candidate related to a member of the HPD attempted to influence the selection process.

18. By letter dated February 8, 2017, Christopher Hopewell, Chairman of the Board of Fire Commissioners, wrote to HRD, in part,

... Mr. Bacon's background investigation revealed that he has ... claimed the merit (sic) preference status for Holyoke residency ... Further investigation ... indicates that he resided with his wife at [address redacted] in Longmeadow ... during the year preceding the examination date. Specifically, Mr. Bacon's credit report shows that he lived in Belchertown Ma and then moved to Longmeadow, Ma (sic). Additionally, Mr. Bacon's voter registration records indicate that he changed his residence from Belchertown to [address redacted] Longmeadow, MA in 2015 ...

On Tuesday, January 17, 2017., (sic) the investigators met with Mr. Bacon and provided him the opportunity to address the discrepancy in his residency. Mr. Bacon stated he had been living with his sister for a period of two (2) years directly moving from Belchertow,(sic), Ma to the [redacted address of the Appellant's sister] in Holyoke, Ma. When questioned about his recent marriage in 2015 and a home in Longmeadow Ma, Mr. Baker (sic) stated his wife owns the home in Longmeadow Ma and that she keeps it so her [child] could attend school in Longmeadow Ma Mr. Baker (sic) failed to provide any evidence to support his claim that he resided in Holyoke for the year preceding the examination date. Additionally, Mr. Bacon was provided the opportunity to address this matter during his interview before the Board ... Specifically, he stated that he, his wife and step son l (sic) live in ... [his] sister's home without providing any evidence to support his claim.

(R.Ex. 11)(emphasis added)¹¹

19. The Appellant filed the instant appeal on April 21, 2017. (Administrative Notice)

¹⁰ The affidavit incorrectly states that the civilian HFD employees relative, who was also a candidate, is unrelated to another Holyoke employee. My calculations here include the civilian HFD's relative as one (1) of the four (4) selected candidates who are related to other Holyoke employees.

¹¹ Three (3) other candidates who were ranked lower than the Appellant were not selected based, in part, on untruthfulness. One (1) of the candidates was not selected because, in part, he was not a Holyoke resident. An additional candidate who was not selected failed to appear at the Fire Commission interview. (R.Ex. 11)

20. On May 3, 2017, HRD notified the Appellant that it had accepted by the bypass reasons offered by the Respondent. (R.Ex. 13)
21. At the July 26, 2017 Civil Service Commission hearing, the Appellant was asked about his residence generally. He was specifically asked if he had changed his voter registration to Holyoke during the year prior to the April 2016 exam. The Appellant tentatively testified that he may have. However, his voter registration information indicates that he did so but not until April 13, 2016, three (3) days prior to the 2016 firefighter exam. At the same Commission hearing, the Appellant was also asked why he would have changed his voter registration from Belchertown to Longmeadow in February 2016, a couple of months after he married Ms. D (who owns a home in Longmeadow) when he was claiming Holyoke residency during that time. The Appellant testified that he thought he would live in Longmeadow. (Testimony of Appellant; R.Ex. 6) I take administrative notice that the Massachusetts Secretary of State voter registration form states, in part, “I hereby swear (affirm) that ... I consider this residence [the address the applicant wrote on the form] to be my home. Signed under the penalty of perjury.”
- <https://www.sec.state.ma.us/ele/elepdf/Voter-reg-mail-in.pdf>
22. The Appellant was also asked at the Commission hearing if he ever stayed overnight at his wife’s house in Longmeadow. As he began to answer, the Appellant testified no, not when they were dating. Asked if he ever stayed at his wife’s house when they got married, the Appellant stated no. The Appellant further testified that his wife comes over sometimes and on weekends. (Testimony of Appellant)

Residence of Mr. S

23. It appears that Lt. Boucher also conducted Mr. S's background investigation. Mr. S is one (1) of the three (3) candidates selected who ranked above the Appellant (and, therefore, did not bypass the Appellant). Mr. S's application stated that he lived at an address [redacted] in Holyoke for the one (1)-year period prior to the 2016 firefighter exam. That address is the same address as Mr. D, an HFD firefighter and friend of Lt. Boucher. Lt. Boucher did not know how much Mr. S paid Mr. D for rent. Lt. Boucher sent a landlord verification form to Mr. D at his home but Mr. D did not fill it out and return it to Lt. Boucher. Lt. Boucher then went to the address provided by Mr. S and found Mr. S there. Lt. Boucher did not check Mr. S's voter registration.¹² Lt. Boucher checked Mr. S's credit and his credit report home address was the same as the one Mr. S wrote on his HFD application. Lt. Boucher testified that he obtained Mr. S's car registration but did not so indicate in his investigation report and the car registration is not in the hearing record. Lt. Boucher's background investigation report concludes that Mr. S's Holyoke residence was verified although it does not explain the reason for this conclusion, nor whether Mr. S resided at the Holyoke address for the one (1) year prior to the 2016 firefighter exam as required for a residency preference claim. (Testimony of Boucher; A.Ex. 9; R.PH.Ex. – Applications and Investigations; Administrative Notice)

In his HFD application, Mr. S indicated that he had applied to the Easthampton Fire Department, in which he may or may not have claimed residence in Easthampton.

However, Mr. S applied to the Easthampton Fire Department in November 2014, which

¹² The Appellant represents that A.Ex. 5 is Mr. S's voter registration information. A.Ex. 5 states that the Appellant has been registered to vote in Easthampton and Westfield but no dates are visible to indicate when he was registered to vote in those places. The Appellant also represents that A.Ex. 7 is a screen shot of the online White Pages stating that Mr. S lives in Easthampton but it is undated. Because these documents lack dates, I give them minimal weight.

was prior to the one (1)-year period prior to the 2016 firefighter exam. (R.PH.Ex. – Applications; Administrative Notice) On a number of screen shots of Mr. S’s Facebook account, Mr. S appears to be posting from Easthampton during the one (1)-year period prior to the 2016 exam but there is insufficient information to indicate if that was where he was residing or visiting at that time. Further, there is no indication that a Facebook subscriber is required to notify Facebook that his or her residence has changed. (A.Ex. 6; Administrative Notice)¹³

Applicable Law

The role of the Civil Service 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). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. 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. 214 (1971). G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass.App.Ct. 315 (1991).

¹³ One other candidate was selected and that candidate bypassed the Appellant. His residence was verified, he is related to a member of the HPD, and his record included criminal charges six (6) to eight (8) years prior to the hiring process here.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

With respect to residency for initial appointment of fire fighters and police officers, G.L. c. 31, s. 58 provides, in part,

... upon written request of the appointing authority to the administrator, the administrator shall, when certifying names from said eligible list for original appointment to the police force or fire force of a city or town, place the names of all persons who have resided in said city or town for one year immediately prior to the date of examination ahead of the name of any person who has not so resided....”

Id.

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant because he was not entitled to a Holyoke residency preference for the entire year prior to the April 2016 firefighter exam. Since all of the candidates who signed the certification claimed Holyoke residency preference and the residency preference was verified for the selected candidates, the Appellant’s name would have appeared at the bottom of the certification and he would not have been reached for consideration.¹⁴

¹⁴ For this reason, it is not necessary to address any other reasons for the Respondent’s decision to bypass the Appellant. Similarly, it is not necessary to address the Appellant’s other allegations against the Respondent, including the complaints that the Appellant filed against the Respondent at the Mass. Commission Against Discrimination and the Ethics Commission in connection with the Appellant’s bypass.

In a new background investigation process at the HFD in 2017, uniformed members of the department conducted the background investigation of applicants for the firefighter position. On his application, the Appellant wrote that his home address was a specific address (redacted) in Holyoke, also writing that his wife (Ms. D) resides at the same address. At times in 2015 and 2016, the Appellant lived in Holyoke with his sister, he asserted, for financial reasons. In the summer of 2015, the Appellant's sister became ill and he helped take care of her children when he wasn't working. The Appellant dated Ms. D some time in or about 2015 and they married in November 2015. Ms. D owns a home in Longmeadow where her child attends school.

When Lt. Boucher conducted the Appellant's background investigation, he sought, among other things, to verify information in the Appellant's application, including the Appellant's Holyoke residency, to ensure that he was entitled to the residency preference he had claimed, putting his name higher on the Certification than candidates who do not claim the residency preference. Lt. Boucher checked the Property Card for the Holyoke address that the Appellant provided on his application and found that the Appellant is not listed as an owner. Although the Appellant's sister filled out a landlord verification form stating that the Appellant lived in Holyoke at the pertinent time, she reported that he did not pay rent but paid for utilities and performed some home maintenance instead, which payments or maintenance was not documented. Lt. Boucher checked the Appellant's credit report, using the Holyoke address that the Appellant provided on his application, which report indicated that in April 2015, the Appellant lived at his wife's address in Longmeadow. Lt. Boucher went to the Holyoke address that the Appellant provided on his job application at two different dates and times, according to the Respondent's practice, to find out if the Appellant lived at that address. At one (1) visit, no one was home. At the other visit, Lt. Boucher spoke to the Appellant's brother-in-law, who

indicated that the Appellant was at work. Lt. Boucher checked the Appellant's address in the online "White Pages", which indicated that the Appellant lives in Longmeadow.

Seeking further clarification regarding the Appellant's residency preference, Lt. Boucher invited the Appellant to an interview. The Appellant then provided his voter registration and motor vehicle registration. However, the Appellant's voter registration indicated that the Appellant changed his residential address from Belchertown to Longmeadow on Feb. 10, 2016 (only a couple of months prior to the firefighter exam) and from Longmeadow to Holyoke on April 13, 2016 (only three (3) days prior to the 2016 firefighter exam). The Secretary of State voter registration form requires applicants to sign, under penalties of perjury, that they reside at the address provided. The Appellant could not have been registered to vote in Longmeadow unless he swore on the registration form that he resided there. The Appellant's motor vehicle registration indicates that the Appellant owns a car but in the section of the registration requiring the owner's "mailing address", it states only the Appellant's name in Holyoke, with no street name and number visible. In addition, the vehicle registration indicates that it was not effective until November 1, 2016, months *after* the April 2016 exam and after the required residency period.

Thereafter, Lt. Boucher prepared a Background Investigation Report (Report), writing that he was unable to verify the Appellant's Holyoke residency. Further, the three (3)-member Fire Commission interviewed the candidates. The only questions that the Fire Commission asked of the Appellant, beyond the questions asked of all of the candidates whom the Fire Commission interviewed, were about his residency preference claim and they asked him for his voter registration and registry of motor vehicles documentation, which the Appellant had already provided to the Respondent. All of the candidates who signed the pertinent certification, like the

Appellant, claimed the residency preference. Lacking verification of his residency preference, the Respondent bypassed the Appellant.

In Layton v Somerville, 24 MCSR 440 (2011)¹⁵, the Commission determined that the word “residence” means “ ... the physical location of the employee’s house or other dwelling place.” Crete v. City of Lawrence, 18 MCSR 22, 23 (2005) citing Doris v. Police Commissioner of Boston, 374 Mass. at 445 (1978). HRD’s Verification of Applicant’s Residence Preference form, states, in part, “ ... [p]ursuant to G.L. Chapter 31, Section 58 [a job applicant] [must] [] *maintain residence* in the Appointing Authority’s community for a *full year* preceding the date of the examination. Residence means the principal place of domicile of the applicant. *Principal place of domicile means an applicant’s true, fixed and permanent home.*” Id. (emphasis added) While being considered for employment at the HFD, the Appellant presented information about his residency that was, at best, inconsistent and, at worst, conflicting. The Appellant wrote in his application that he and his wife lived at the Appellant’s sister’s Holyoke address. However, as the Appellant himself acknowledged, his wife owns a home in Longmeadow so her child can attend Longmeadow schools. It is inaccurate to represent that a married couple “resides” in one place, as the Appellant did on his application, while acknowledging that his wife owns a home approximately ten miles away in Longmeadow so that her child can attend school there. Moreover, it strains credulity for the Appellant to testify that he did not stay at his wife’s house overnight at all when they were dating or even after they were married and that his wife only visited him in Holyoke sometimes and on weekends. In addition, although the Appellant testified, and his sister’s landlord verification form asserts that the Appellant continually resided in Holyoke from January 2015 to the present, including the April 2015 to April 2016 period prior to the April 2016 exam, there is little support for such testimony and assertion. First, both the

¹⁵ Layton v Somerville, Ruling on Motion for Reconsideration, at 24 MCSR 619 (2011).

Appellant and his sister acknowledge that he did not pay her rent. Instead, they assert that the Appellant paid the utility bills at his sister's house. However, the utility bills are in the Appellant's sister's name and the Appellant offered no documentation of any of his purported utility bill payments. Third, Lt. Boucher obtained the Appellant's credit report, which indicated that as of April 2015, the Appellant reported that his home was in Longmeadow (at Ms. D's address). Fourth, Lt. Boucher attempted to verify the Appellant's residence in Holyoke by going to the Holyoke address twice – on two different days and different times of day – but he did not find the Appellant there. Fifth, when Lt. Boucher was unable to verify the Appellant's Holyoke residency, he invited the Appellant to a discretionary interview to give him the opportunity to clarify his residence. As a result of the interview, the Appellant produced his car registration and voter registration. However, the Appellant's car registration only indicated that his car was registered in Holyoke, with no street name and number visible, and it was not effective until November 1, 2016, or six (6) months after the April 2016 firefighter exam. Similarly, the Appellant's voter registration did not support the Appellant's residency claim because it showed that he was registered to vote in Belchertown in 2014; that on February 10, 2016 (two (2) months prior to the April 2016 firefighter exam) he registered to vote in Longmeadow, citing his wife's address there as his home; and that on April 13, 2016 (just days prior to the end of the residency period, and only days prior to the 2016 exam) the Appellant registered to vote in Holyoke using his sister's address. As noted above, voter registration forms are signed under the penalty of perjury. Despite its efforts, the Respondent could not verify that the Appellant actually resided for the full period between April 2015 and April 2016. Since all of the candidates who signed the certification claimed Holyoke residency preference and the

residency preference was verified for the selected candidates, the Appellant's name would have appeared at the end of the certification and he would not have been considered for employment.

The Appellant avers that he did reside in Holyoke continuously between April 2015 and April 2016 and that the hiring process for verifying his timely residency in Holyoke was not "uniform". Therefore, he asserts, the Respondent has not established reasonable justification for his bypass. In effect, the Appellant argues that documents obtained in the course of background investigations should be identical. As a practical matter, when seeking to verify residency certain documents or actions can persuasively verify residence, perhaps without the need for further information, while other documents may not, warranting pursuit of additional information. For example, if a candidate produces consistent and reliable documentation of his residency claim for the full one (1)-year period prior to the firefighter exam, little further documentation may be needed. However, when, for example, a candidate is married and asserts that he and his wife live in a city or town hiring firefighters but his wife owns a home in another city or town, where her child attends school, the candidate does not pay rent in the hiring community, the candidate asserts that he pays for utilities in the hiring community but the bill is in someone else's name and there is no documentation indicating that the candidate pays for the utilities, and the investigator twice went to the hiring community address that the candidate provided and could not verify the candidate's address, the appointing authority could seek additional information in order to decide if the candidate's residence had been verified. Presumably, candidates would want the hiring community to accept added information if it would help establish their timely residency. That said, I note that Mr. S, who was selected and ranked higher on the certification than the Appellant, wrote on his application that he lived at a street address [redacted] in Holyoke during the residency period. The Holyoke address he

provided is the address of Mr. D, an HFD firefighter and friend of Lt. Boucher. Lt. Boucher sent the usual landlord verification form to Mr. D but Mr. D did not fill it out and return it. Lt. Boucher did not know how much Mr. S paid Mr. D for rent nor if Mr. S resided at the address of Firefighter D for the full year prior to the 2016 firefighter exam. Lt. Boucher visited the address Mr. S provided and found Mr. S there. Lt. Boucher did not check Mr. S's voter registration, although he checked Mr. S's credit report, which affirmed the Holyoke address at that time. Lt. Boucher's background investigation report concludes that Mr. S's Holyoke residence was verified at that time but there is no indication that he verified Mr. S's residency for the full year period prior to the 2016 exam, as required for residency preference. However, this does not undermine the Respondent's determination that the Appellant's timely Holyoke residency was not verified.

The Appellant further argues that the hiring process was unfair because some successful candidates are related to other City of Holyoke employees. As an aside, I note that I had to make multiple requests before the Respondent produced information indicating which of the selected candidates were related to other Holyoke employees or officials. Four (4) successful candidates are related to other Holyoke employees; three (3) are related to members of the HFD (two (2) uniformed and one (1) civilian) and one (1) is related to a uniformed member of the HPD. There is no evidence in the record to indicate that three (3) of such family members were involved in the hiring process. The one (1) civilian HFD employee related to a selected candidate recused herself from involvement in her relative's candidacy on advice from a City attorney at the time.¹⁶

¹⁶ As noted above, the Appellant filed a complaint at the State Ethics Commission regarding the HFD civilian relative's role in the hiring process here. I make no determination whether the civilian employee's conduct satisfied applicable obligations under G.L. c. 268A. However, this Commission has found in other bypass appeals that employees who are related to a candidate should remove themselves from the hiring process entirely so that they are not involved directly in the appointment of their relative or indirectly by undermining other candidates. *See, e.g., Smyth v. Quincy*, 24 MCSR 497 (2011); *King v. Medford*, 19 MCSR 317 (2006); 20 MCSR 608 (2007); *Minoe v. Braintree*, 27 MCSR 615 (2014); *Maldonado v. Lawrence*, 31 MCSR 212 (2018).

Conclusion

Accordingly, for the above stated reasons, the bypass appeal of Mr. Bacon, Docket No. G1-17-075, is hereby **denied**. In addition, by June 28, 2019 the Respondent shall provide a report of any information that supports Mr. S's residency claim for the one (1) year period prior to the 2016 firefighter exam. Upon receipt thereof, the Commission will decide what, if any, further action is necessary.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 23, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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. 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:

Shawn P. Allyn, Esq. (for Appellant)

Tasha Marshall, Esq. (for Respondent)