

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

STEFAN H. BARNICKEL,
Appellant

v.

G1-07-62

TOWN OF AGAWAM,
Respondent

Appellant's Attorney:

Pro Se
Stefan Barnickel
P.O. Box 771
Westfield, MA 01085

Respondent's Attorney:

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36 Main Street
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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Stefan H. Barnickel (hereinafter "Barnickel" or "Appellant") seeks review of the Personnel Administrator's decision to accept the reasons of the Town of Agawam (hereinafter "Appointing Authority" or "Town") bypassing him for original appointment to the position of Firefighter/Paramedic. A full hearing was held on November 19, 2007 at the offices of the Civil Service Commission (hereinafter "Commission"). One (1) tape was made of the hearing and is retained by the Commission.

FINDINGS OF FACT

Five (5) joint exhibits and one (1) stipulation were entered into evidence at the hearing. Based on these exhibits and stipulation and the testimony of the Appellant and Steven Martin (hereinafter “Martin,” or “Chief”), Fire Chief of Agawam, I make the following findings of fact:

1. The Appellant is a firefighter/paramedic currently employed by the City of Springfield, Massachusetts. (Testimony of Appellant)
2. Prior to this action, the Appellant had been employed by the Town of Westfield as a firefighter/paramedic from 2000 to 2005. Sometime in early 2005, the Appellant was suspended with pay or placed on paid leave from the Town of Westfield for approximately six (6) months. The Appellant voluntarily left that position when he resigned on or about July 6, 2005. (Testimony of Appellant)
3. The cause of this paid suspension or leave was never made clear to the Appellant by the Town of Westfield. However, the Appellant believed that the cause possibly was a personality conflict that developed between him and the Town of Westfield’s Medical Director, Dr. Brian Sutton. The Appellant believed that Dr. Sutton had a controlling personality and that for some unknown reason Dr. Sutton initiated a power struggle with him. Neither Dr. Sutton nor any other representative of the Town of Westfield ever informed him of what problem existed or why he was placed on paid leave or suspension. He was utterly left without any specific information to rebut in order to address the suspension issue.(Testimony of Appellant)
4. Paramedics or EMTs are required to be employed by a municipality, under the “medical control clearance” of a physician or Medical Director, who is an MD. In effect the

paramedics are employed under the medical license of the Medical Director. The appellant has been employed in the past, under the medical control clearance of four other Medical Directors, without any problems or incidents. (Testimony of Appellant)

5. The Appellant, like any other paramedic in Massachusetts, is at the mercy of the Medical Director he is employed under. The Medical Director has the discretion to refuse to sign a particular paramedic's medical control clearance and thereby deprive the paramedic of the opportunity to work as a paramedic for the Town, for which he is the Medical Director. (Testimony of Martin and the Appellant)
6. The Appellant took and passed a 2005 open civil service examination for the position of firefighter/paramedic. His name appeared thereafter on an eligible list, certification # 260252, dated May 17, 2006. (Stipulation, testimony of Appellant)
7. The Appellant, after being notified, signed the list as being willing to accept appointment to the position of firefighter/paramedic with the Town of Agawam. (Testimony of Appellant)
8. In June of 2005, the Appellant and the Town of Agawam engaged in an initial interview, by a three member interview panel, for possible appointment as a firefighter/paramedic with the Town of Agawam. (Testimony of Appellant)
9. The Appellant's name appeared on Certification # 260252 for the position of firefighter/paramedic for the Agawam Fire Department. The Appellant's name appeared second out of four candidates who were willing to accept the position. (Exhibit 4)
10. In September or October of 2006, the Appointing Authority interviewed those candidates for appointment to two (2) positions as firefighter/paramedics with the Town of Agawam. The three member interview panel included Martin, who was then Deputy Fire Chief and also

included then Fire Chief Pizzano. Martin was present at each interview. (Testimony of Martin)

11. The Appointing Authority claims that it relied on a uniform set of form-questions to which each candidate was questioned and permitted to respond. (Testimony of Martin)
12. Each candidate was also asked general questions regarding their past employment.
(Testimony of Martin)
13. However, Martin had no notes of the interviews and his memory was very weak or non-existent regarding any specifics that occurred during the Appellant's interview. The most that could be said regarding Martin's memory of the Appellant's interview is that he had vague impressions of the questions and answers that occurred. His testimony was couched with qualifiers, such as: "I believe, "I do not recall the specifics", "I don't remember", "There is some uncertainty..." etc. Martin also attempted to justify his weak memory of the interviews by testifying that he was asking the questions, during the interview while the other two panel members were taking notes. (Testimony and demeanor of Martin)
14. At the interview, the Appellant disclosed the existence of the Westfield six month paid leave or paid suspension, prior to his resignation from that position. However, as he explained at the interview, he did not have any specific information as to the cause of the paid leave or suspension. He had never been informed of the reasons for the paid suspension, despite his numerous requests for same. In any event he also believed that he could not disclose more detail due to a "non-disclosure" statement that he had signed and the fact that the matter had never been finally resolved and remained open to the date of this hearing. The Appellant explained his predicament in detail to the interview panel. (Testimony of Martin and Appellant, administrative notice of case file)

15. The Appointing Authority did not investigate the employment situation regarding the Appellant and the Town of Westfield after the interview. (Testimony of Martin, Exhibit 3)
16. The Appointing Authority appointed two firefighter/paramedic positions from Certification # 260252. One (1) candidate selected for the appointment appeared below the Appellant and one (1) appeared higher than the Appellant, on the certification. (Exhibit 4)
17. Personnel Administration Rules .08 (3) states in relevant part, "Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, *or of the reason or reasons for selecting another person or persons, lower in score or preference category.*" (*emphasis added*) (PAR .08(3)).
18. On or about September 13, 2006 the Town submitted a letter to the Department of Personnel Administration, Human Resources Division (hereinafter "HRD"), a statement of the reasons for selecting the other two candidates: John LaBrecque and Renee Rouchette.

(Administrative notice of case file).
19. Mr. Labrecque name appeared higher on the civil service certification than the Appellant.

Ms. Rouchette name appeared lower than the Appellant. (Administrative notice of case file).
20. The September 13, 2006 letter stated that Ms. Rouchette was selected for appointment based on her thirteen (13) years experience, excellent references, educational achievement, and the fact that she answered interview questions without hesitation. (Administrative notice of case file). ()

21. Said letter stated that the Appellant “was bypassed[.] [H]e conflicted with the Westfield fire department and failed to bring this to our attention [that] he was currently employed with the city of Westfield and has since left employment.” (Exhibit 4)
22. On October 7, 2006, HRD sent a request to the Town of Agawam for additional information regarding their decision to bypass the Appellant and another candidate. (Exhibit 1 and Administrative notice of case file).
23. On October 16, 2006 the Town submitted a letter stating those reasons for bypass to HRD. (Exhibit 1)
24. The Town stated in its October 16, 2006 letter, that the Appellant was bypassed due to the following: that: he “was given the opportunity to resign from his position in Westfield, if he did not resign he would have been terminated. He had “a number of conflicts with supervisors” at Westfield The letter further stated that the Appellant “did not tell us what was going on with Westfield, in the interview we had to ask him at which point he did not tell us the truth about the situation that occurred for this reason the Town of Agawam does not feel it would be in the best interest to hire Mr. Barnickel. It is apparent that he seems to have a problem with authority and therefore did not make him a good candidate.” (Exhibit 1)
25. The October 16, 2006 letter also stated that the other bypassed candidate was bypassed due to her lesser experience and certifications as an EMT. (Exhibit 1).
26. On October 26, 2006, HRD approved the Town’s bypass reasons and notified the Appellant with a copy of the October 16th letter attached, that he was bypassed for the position as Firefighter/Paramedic for the town of Agawam, all in compliance with G.L. c 31 § 27. (Administrative notice of general laws and case file)

27. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. See PAR.08(3). (Administrative notice)
28. The Appellant filed a timely appeal with the Civil Service Commission, on December 26, 2006. The Appellant attached copies of numerous correspondences and other documentation to his appeal. (Testimony of Appellant and Administrative notice of case file)
29. The Appellant made a diligent and concerted effort to obtain copies of all relevant documentation for this appeal by repeated requests to the Human Resources Division (HRD), the Civil Service Commission and the Town of Agawam and the City of Westfield. (Testimony of Appellant, Exhibits 2 & 3 and Administrative notice of case file)
30. The City of Westfield and its Fire Department did not release any information regarding the Appellant's employment there except that he "resigned from the City of Westfield in July, 2005." (Exhibit 3)
31. The Human Resources Division, (HRD) did not have a representative appear at this Commission hearing, held on November 19, 2008. HRD did not file a set of relevant documents at the Civil Service Commission, prior to this hearing. (Administrative notice of case file)
32. The Appellant appeared to be credible, straight forward and honest when testifying before the Commission. He answered the questions put to him, based on his personal knowledge only. When pressed to answer a question regarding a matter he did not have personal knowledge, he would surmise based on what he did know. He had been diligent in obtaining relevant information and documentation from several sources so that he might be able to answer

questions more fully. During his testimony he repeatedly expressed frustration with his lack of specific facts regarding the cause of his paid suspension from the Westfield Fire Department. He also repeatedly expressed a sincere belief that he was prevented from disclosing or discussing the supposed reasons for that paid suspension. His belief in this non-disclosure requirement is reflected by a similar belief held by the City of Westfield and reflected in its letter of December 20, 2006. (Testimony and demeanor of Appellant, Exhibits 2 & 3, Administrative notice of case file)

33. The Appellant did honestly answer the questions posed to him during the panel interview, regarding his employment and paid suspension with the Westfield Fire Department, to the best of his abilities, under the circumstances at that time. The Appellant however, lacked specific information and believed himself to be under a non-disclosure obligation regarding the paid suspension at that time. The Appellant voluntarily resigned from the Westfield position in July, 2005, because the situation was not being resolved and he felt that he had no other choice. The Appellant was never informed by Westfield that he would be terminated if he did not resign. (Testimony and demeanor of Appellant, Exhibits 2 & 3, Administrative notice of case file, Exhibits and testimony)

34. The Appellant did not have a number of conflicts with supervisors while employed at the Westfield Fire Department. The Appellant had a good past employment record and did not have a problem with authority at the time he was bypassed by the Appointing Authority. (Testimony and demeanor of Appellant, Exhibits 2 & 3, Administrative notice of case file, Exhibits and testimony)

CONCLUSION

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). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

The Commission is not attempting here, to interfere with the properly applied discretion of either the Appointing Authority in its bypass decision or the personnel administrator in approving the reasons therefore, pursuant to G.L. c. 31 § 27. The Commission and the personnel administrator must operate within the authority granted to them by the Legislature. Any discretion which they may employ in fulfilling their respective duties is limited to sound judgment necessary to accomplish objectives of the civil service statute. Feeney v Comm., 373

Mass. 359, 364-365. Fundamentally, the provisions of the civil service statute protect the public and the employee from arbitrary and capricious action or actions and coercions for political purposes. See Callanan v Personnel Adm'n for Comm., 400 Mass. 597 (1987).

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).

Basic merit principles, as required by G.L. c. 31, require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Department, 6 MCSR 145 (1993). One way candidates are protected from arbitrary and capricious actions is by the application of Personnel Administration Rule PAR .08(3), which states that "No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission." PAR .08(3) is intended to "uphold the basic tenet of the civil service law to protect the service from arbitrary and capricious actions and to avoid overtones of political motivations and bias in employment" [citations omitted]. It would seem that the requirement for a statement of reasons at the time of a

bypass decision is to ensure that the real reason for the appointing authority's decision is known and to prevent post-decision rationalizations which might mask arbitrary or politically-motivated choices. Town of Oxford v. Civil Service Commission, Worcester Superior Court, C.A. No. 05-1740-B, 1/2/07.

Pursuant to G.L. c. 31, § 27, the Appointing Authority was required to appoint two (2) of the highest five (5) names (the "2n+1" formula) on the certification list who were willing to accept the position. Section 27 also requires that an Appointing Authority file with the Personnel Administrator a statement of reasons each time it appoints a candidate ranked lower on the "eligibility list" over a candidate ranked higher on such list.

In the instant matter, the Appointing Authority submitted two statements of reasons for bypassing the Appellant. In its first correspondence to HRD, dated September 13, 2006, the Appointing Authority stated that the Appellant was bypassed because "he conflicted with the Westfield fire department and failed to bring this to our attention [sic] he was currently employed with the city of Westfield and has since left employment." (Exhibit 4). Three weeks later the Appointing Authority supplemented its explanation to the HRD and re-stated that the Appellant was bypassed due to the fact that he was less-than-truthful regarding the 'situation' at Westfield and that the Appellant has had "a number of conflicts with supervisors." (Exhibit 1). This second letter was attached to the HRD notice of bypass to the Appellant. (Exhibit 5).

The notice provided to the Appellant was impermissibly vague and did little to nothing to explain the Appointing Authority's decision to bypass the Appellant. Based on the notice provided to HRD and the Appellant, it is unclear what grounds the Appointing Authority relied upon to justify bypassing the Appellant. The Appointing Authority did not make an effort to

clarify or confirm the information provided by the Appellant prior to their decision to bypass him. (Testimony of Martin) The correspondence from the City of Westfield to the Appellant confirm that Westfield has “released no information to any prospective employers, other than dates of employment and the fact that [Appellant] resigned from the City of Westfield in July, 2005.” (Exhibit 3). Basic merit principles require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Department, 6 MCSR 145 (1993). In the instant appeal, the Appointing Authority does not refer to the Appellant’s knowledge, skills, or relative abilities; rather it relies on the absence of facts regarding the Appellant’s previous employment situation.

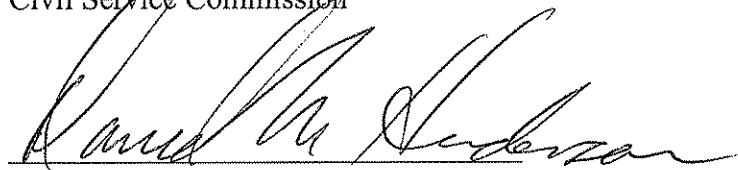
The failure by the Appointing Authority to conduct a proper inquiry and investigation into the matters concerning the Appellant’s prior employment resulted in an overly vague notice to be issued to the Appellant. Given a more thorough interview and background check process, the Appointing Authority may have been able to support a decision to bypass the Appellant. However, the Commission must rely on the cryptic written reasons submitted to HRD by the Appointing Authority. Based solely on those reasons, the Town has not provided sound and sufficient reasons for bypassing the Appellant, in favor of the candidate appearing lower on the certification. The Town has failed to produce sufficient reliable evidence in the record to support its decision to bypass the Appellant for appointment.

The Appellant has shown by a preponderance of the evidence in the record that he did not receive a fair and equal opportunity for consideration by the Town, for this appointment. The rights of the Appellant were violated through no fault of his own.

WHEREFORE, the Appellant's Appeal under Docket No. G1-07-62 is hereby *allowed*. Pursuant to our powers of relief inherent in Chapter 534 of the acts of 1976, as amended by Chapter 310 of the Acts of 1993, the Commission hereby orders the Human Resources Division to take the following action:

The Human Resources Division shall place Stefan Barnickel's name at the top of the eligibility list for original appointment to the position of firefighter/paramedic, so that his name appears at the top of the existing certification and/or the next certification which is requested by the Town of Agawam from the Human Resources Division and from which the next original appointment to the position of firefighter/paramedic in the Town of Agawam shall be made by the Appointing Authority, so that he shall receive at least one opportunity for consideration.

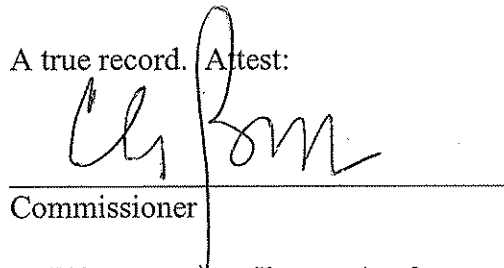
Civil Service Commission



Daniel M. Henderson,
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman voted no; Henderson, voted yes, Marquis voted no, Stein voted yes, and Taylor voted yes, Commissioners) on June 26, 2008.

A true record. Attest:


Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice sent to:

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