

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JOSHUA BRUINS,

Appellant

CASE NO. G1-19-206

v.

NEW BEDFORD FIRE DEPARTMENT,

Respondent

Appearance for Appellant:

Joshua Bruins, Pro Se

Appearance for Respondent:

Elizabeth Pio, Esq.
Associate City Solicitor
City of New Bedford Law Department
133 William Street
New Bedford, MA

Commissioner:

Paul M. Stein

DECISION

The Appellant, Joshua Bruins, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), from his bypass for appointment as a Firefighter with the City of New Bedford Fire Department (NBFD).¹ A pre-hearing conference was held at the UMass School of Law at Dartmouth, MA on October 25, 2019 and a full hearing was held at that location on January 10, 2020, which was digitally recorded.² Seven (7) exhibits (*Exhs. 1 through 4A-4J, 5 & 6*) were received in evidence. At the Commission's request the NBFD submitted a CD which I have marked in evidence (*PHExh.7*). Neither party submitted a Proposed Decision. For the reasons stated below, Mr. Bruins' appeal is allowed.

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

² Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the 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.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Paul N. Coderre, Jr., Chief, NBFD
- Scott Kruger, Deputy Chief, NBFD

Called by the Appellant:

- Joshua Bruins, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Joshua Bruins is a New Bedford resident in his mid-thirties. He holds a Bachelor's Degree in History and Political Science from UMass Dartmouth. (*Exhs. 3 & 13; Testimony of Appellant*).

2. Mr. Bruins enlisted in the United States Marine Corps and served honorably as an infantry officer and company commander from 2009 until 2013, including two overseas combat deployments. While deployed, he commanded a motorized infantry, which required management of over forty military vehicles from Humvees to tanks. He is a qualified disabled veteran for civil service purposes. (*HRD Submission (10/24/2019); Testimony of Appellant*)

3. While serving in the military, during his off-duty hours while stationed in North Carolina awaiting the processing of his discharge, Mr. Bruins joined a local fire department as a volunteer firefighter. He completed training and was certified as a North Carolina Level I & II Firefighter and EMT. He responded to more than a dozen calls, including one structural fire. After discharge from the Marine Corps, Mr. Bruins moved to Vermont to live temporarily with his father where he also volunteered with the local fire department. (*Testimony of Appellant*)

4. Since the summer of 2013, Mr. Bruins has held the position of vineyard manager at the Westport Rivers Winery in Westport, MA. (*Testimony of Appellant*)

5. Mr. Bruins took and passed the civil service examination for Firefighter administered by the Massachusetts Human Resources Division (HRD) on March 24, 2018 with a score of 99.³ He was ranked third (the highest scoring disabled veteran) on the eligible list established on November 18, 2018. (*Stipulated Facts; HRD Submission (10/24/2019); Testimony of Appellant*)

6. On March 18, 2019, HRD issued Certification No. 06166 to New Bedford for the appointment of six (6), later amended to ten (10), full-time permanent Nbfd Firefighters. Mr. Bruins' name appeared in a tie group in the 3rd position on the certification. (*Stipulated Facts; HRD Submission (10/24/2019)*)

7. On or about September 1, 2019, New Bedford appointed a total of ten candidates from Certification No. 06166, all of whom were ranked below Mr. Bruins, who was bypassed. (*Stipulated Facts; Exh.1: Testimony of Deputy Chief Kruger; Chief Coderre*)

8. By letter dated September 16, 2019, Nbfd Chief Coderre informed Mr. Bruins that he had not be selected for employment as an Nbfd Firefighter, stating the following reason:

“A review of your driving record shows a consistent pattern of offenses. Including, but not limited to an OUI charge and driving an unregistered vehicle with a suspended license as well as a more recent offense (2018) of distracted driving. Respect for the law is an essential qualification to be a member of the New Bedford Fire Department and you chose to disregard it, when compared with other applicants, this reflects poorly.”

(*Exh.1*)⁴

9. The sole information Nbfd relied upon to disqualify Mr. Bruins was a “10-year lookback” of: (his RMV Driver History Report dated May 2, 2019; and (2) a criminal docket concerning 2015 charges (discovered through a routine check for court records in jurisdictions where the candidate resides or has resided). (*Exhs. 2 & 3; Testimony of Deputy Chief Kruger*)

³ Mr. Bruins also took the 2016 Firefighter examination but, due to a mistake regarding his status as a New Bedford resident, he was not appointed during the life of that eligible list. (*Exh. 1; Testimony of Appellant*)

⁴ An additional reason for the bypass, allegedly falsely claiming to be a New Bedford resident, was not pressed at the full hearing after the Appellant provided satisfactory proof of his residency in New Bedford at the pre-hearing conference.

10. The RMV Driver History Report contained the following entries within the past ten years that New Bedford found problematic (Five Incidents):

<p>NDR Violation 0-043-189-584 Sanction</p>	<p>NDR VIOLATION - Reported Date:03-Aug-2009 Disposition:R Jurisdiction Code: NC NDR VIOLATION Suspended:02-Sep-2009 to 02-Mar-2011 Reinstated: 02-Mar-2011 Jurisdiction Code:NC Source Violation Id: 0-043-189-584</p>
<p>Out of State Conviction 0-043-189-579 Sanction</p>	<p>DUI OF ALCOHOL OR DRUGS – NC Posted Date:01-Mar-2011 Violation Date:07-July-2009 Finding Date:02-Oct 2009 Disposition:G SDIP Points 5 OPERATING UNDER INFLUENCE (OUI) Suspended:24-Nov-2019 to 02-Mar-2011 Reinstated: 02-Mar-2011 Jurisdiction Code:NC Source Violation Id: 0-043-189-579</p>
<p>NDR Violation 0-043-189-585 Sanction</p>	<p>NDR VIOLATION - Reported Date:25-Jan-2012 Disposition:R Jurisdiction Code: NC NDR VIOLATION Pending Period:25-Jan-2012 to 10-Feb-2012 Cleared:10-Feb-2012 Jurisdiction Code:NC Source Violation Id: 0-043-189-585</p>
<p>Violation 0-43-168-575</p>	<p>90/7/D – EQUIPMENT VIOLATION, MISCELLANEOUS MV *C90§7 Posted Date:21-Aug-2015 Violation Date:12-Aug-2015 Finding Date:17-Sept-2015 Disposition:R Location:New Bedford Citation No: R6609709</p>
<p>Violation</p>	<p>90/20/B – INSPECTION STICKER, NO *C90§20 Posted Date:21-Aug-2015 Violation Date:12-Aug-2015 Finding Date:17-Sept-2015 Disposition:NP Location:New Bedford Citation No: R6609709</p>
<p>Sanction</p>	<p>PAYMENT DEFAULT Suspended:27-Oct-2015 to 16-Nov-2015 Reinstated: 16-Nov-2015 Source Violation Id: 0-043-189-575 Citation No. R6609709</p>
<p>Violation</p>	<p>90/9B – UNREGISTGERED MOTOR VEHICLE *C90§9 Posted Date:30-Nov-2015 Violation Date:13-Nov-2015 Finding Date:29-Jan-2016 Disposition:NR Location:New Bedford Citation No: R6614336</p>
<p>Violation</p>	<p>90/23/D – LICENSE SUSPENDED, OP MV WITH *C90§23 Posted Date:30-Nov-2015 Violation Date:13-Nov-2015 Finding Date:20-Jan-2016 Disposition:DISM Location:New Bedford Citation No: R6614336</p>
<p>Warning</p>	<p>90/13B ELECTRONIC MESSAGE, OPERATOR SEND/READ *C9 Event Date: 9/3/2018</p>

(Exh. 2; Testimony of Deputy Chief Kruger & Chief Coderre)

11. The criminal docket disclosed that Mr. Bruins was charged on 11/24/2015 with two offenses allegedly occurring on November 13, 2015 which were the same subject of the Citation No. R6614336 referred to in the RMV Driver History Report above: (1) Operating a Motor Vehicle with License Suspended, which was dismissed on January 29, 2016; and (2) Unregistered Motor Vehicle, for which he was found Not Responsible. (*Exh. 3*)

12. Two other candidates, who ranked below Mr. Bruins and were appointed from Certification No. 06166 had the following infractions on the RMV Driver History Report during the “10-year look-back” period:

Candidate G (Three Incidents)

- Accident SURCHARGEABLE ACCIDENT – PROPERTY DAMAGE LIABILITY
Posted Date:02-Nov-2009 Incident Date:18-Jul-2009 Finding Date:29-Oct-2009
Disposition:R SDIP Points:3
- Accident SURCHARGEABLE ACCIDENT – COLLISION
Posted Date:30-Aug-2012 Incident Date:18-Aug-2012 Finding Date:23-Aug-2012
Disposition:R SDIP Points:4
- Accident SURCHARGEABLE ACCIDENT – COLLISION
Posted Date:01-May-2013 Incident Date:16-Dec-2012 Finding Date:26-Apr-2013
Disposition:R SDIP Points:4

Candidate J (Three Incidents)

- Violation 90/17/A – SPEEDING *C90§17
Posted Date:13-Sep-2013 Violation Date:30 Aug 2012 Finding Date:18 Sep-2012
Disposition: R Location: Fall River SDIP Points: 2
Citation Number: R1053347
- Violation 90/17/A – SPEEDING *C90§17
0-073-604-221 Posted Date:05-Jun-2014 Violation Date:23-May-2014 Finding Date:30-Jun-2014
Disposition: NP Location: Fall River Citation Number: R4565192
- Violation 90/20/B– INSPECTION STICKER, NO *C90§20
0-073-604-222 Posted Date:05-Jun-2014 Violation Date:23-May-2014 Finding Date:30-Jun-2014
Disposition:NP Location:Fall River SDIP Points:2 Citation Number:R4565192
- Sanction PAYMENT DEFAULT
Pending Period: 30 June-2014 to 29-Jul-2014 Cleared:29-Jul-2014
Source Violation Id:0-073-604-221 Citation Number:R4565192
- Violation 90/17/A – SPEEDING *C90§17
Posted Date:17-Nov-2016 Violation Date:8-Nov-2016 Finding Date:29-Nov-2016
Disposition R Location:Westport SDIP Points:2 Citation Number: R7561269

(*Exhs. 4G & 4J*)

13. Mr. Bruins brought up his OUI when he was interviewed by the Nbfd and it was discussed thoroughly. The Nbfd did not ask him any questions about any other of his driving infractions. (*Testimony of Appellant*)

14. At the Commission hearing, Mr. Bruins provided the following information about the incidents reflected on his RMV Driver History Record:

- He acknowledged that the OUI was a very serious offense. He pointed out that the incident had occurred nearly ten years ago (actually just over ten years ago, measured from the date of bypass) and that he has maintained a clean driving record since then, with his only violation being an “equipment violation” explained below, and no SDIP Points assessed on his record since the OUI.
- He has no recollection of any infraction while in North Carolina and had no knowledge of what the 2012 “NDR Violation” could have been.
- The August 2015 Inspection Sticker violation and the Equipment Violation involved a burned out license plate illumination bulb that he had not fixed before his inspection sticker expired. He rectified the deficiency, took responsibility for the equipment violation and the inspection sticker violation was dropped.
- The November 13, 2015 charge of operating an Unregistered Vehicle arose when Mr. Bruins was driving a relative’s vehicle without knowing the registration had expired. The criminal charges were dropped, the matter was handled as a civil infraction and he was found Not Responsible for that infraction.
- Mr. Bruins was also charged on November 13, 2015 with Operating with a Suspended License, which had recently been suspended due to non-payment of overdue parking tickets (hence, the Non-Payment Default issued on October 27, 2015).

Mr. Bruins did not realize his license had been suspended until he was stopped on November 13, 2015. He immediately cleared up the over-due tickets, his license was reinstated on November 16, 2015, and the criminal charges were dismissed.

- The 2018 Warning for Sending/Receiving Electronic Messages (“what the Nbfd bypass letter refers to as “Distracted Driving”, resulted after Mr. Bruins had checked his cell phone while stopped at a traffic light and, when the light turned green, the motorist behind him beeped at him for not starting up right away. The incident was observed by a police officer who pulled Mr. Bruins over and explained that the cell-phone law now prohibited any use of the device, even when stopped at a traffic light.

(Exhs. 2 & 3; Testimony of Appellant)

15. As the Nbfd had no information about any of Mr. Bruins’ driver history other than the RMV Driver History Report and the Criminal Docket, and asked him no questions about it during the background investigation, neither Nbfd witness offered any testimony about the specific facts and circumstances of the criminal charges or entries on the driving record. In particular, the witnesses could shed no light on the 2012 North Carolina entry about which Mr. Bruins had no recollection. *(Testimony of Deputy Chief Kruger & Chief Coderre)*

16. At the Commission hearing, the Nbfd witnesses distinguished Mr. Bruins’ driver history from Candidate G and Candidate J on several grounds. Candidate G’s surchargeable accident record was not sufficient to create an unreasonable risk that he may be unsuitable to operate Nbfd fire apparatus⁵ because his last accident occurred in 2012, and he had “cleaned up his act” since then. Candidate J’s history of speeding violations was similarly not considered as risky behavior or as “dangerous” as an OUI. *(Testimony of Deputy Chief Kruger & Chief Coderre)*

⁵ In addition to operating fire apparatus, Nbfd firefighters are also called upon to drive the New Bedford EMS ambulance apparatus when both EMS paramedics are required to remain with a seriously ill or injured patient in route to the hospital. *(Testimony of Deputy Chief Kruger & Chief Coderre)*

17. The Nbfd witnesses did acknowledge that driving with a broken license plate illumination light (the one offense for which Mr. Bruins was held responsible since 2009) was not a “dangerous” act. The Nbfd witnesses also acknowledged that Mr. Bruins’ OUI, alone, would not have necessarily led to the decision to bypass him, but that it was that old offence, together with the “totality” of the continued “pattern” of his driver history that resulted in the bypass decision. (*Testimony of Deputy Chief Kruger & Chief Coderre*)

APPLICABLE CIVIL SERVICE LAW

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

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c.31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

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

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’ ”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211,214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission “cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L.c.31,§2(b), also gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing

authority's action"; it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." Id.

ANALYSIS

New Bedford has failed to establish reasonable justification to bypass Mr. Bruins after a thorough and impartial review of his qualifications for appointment to the position of an Nbfd Firefighter for the single reason asserted in this appeal, namely, that his driving record "shows a consistent pattern of offenses" and a "disregard" for the law.

First and foremost, I see no basis upon which to conclude that Mr. Bruins' record reflected a "pattern" of offenses that is disqualifying, especially when the record of Candidate G (with three surchargeable incidents and 11 SDIP points accumulated over the most recent ten year period) is not similarly treated as a "pattern" of offenses. The preponderance of the evidence established that Mr. Bruins committed only one "offense" (an OUI in 2009) and that, save for a civil infraction for operating without an illuminated license plate and a warning for checking his mobile phone while stopped at a traffic light, his driving record has been free of criminal offenses, civil infractions or motor vehicle accidents, and no SDIP points assessed.

Thus, the single criminal "offense" for which Mr. Bruins was ever held responsible occurred in July 2009.. The 2018 "offense" mentioned in the bypass letter was not an offense at all, but a warning, and neither were other incidents mentioned in the bypass letter for which he was not held responsible, "offenses" he committed.⁶ The driving an unregistered vehicle charge was dropped, treated as a civil infraction, for which Mr. Bruins was held not responsible and the driving with a suspended license charge was dismissed.

⁶ I do not minimize the importance of the public policy underlying the distracted driving law but only that a warning does not trigger any penalty and is not appealable.

Second, Mr. Bruins does not shy from responsibility for his OUI but notes that this offense occurred in 2009 and that, since then, his criminal record is clean and his driving record, save for a minor citation and a warning, is also clean. (His only surchargeable accident occurred in 2007, well beyond the look-back period applied by New Bedford.)⁷ Mr. Bruins presented himself at the Commission hearing as an honest and sincere individual, as well as an articulate, respectful and effective advocate. He made a very persuasive and convincing case that he took full responsibility for his criminal record and I believe his testimony that he has learned from his OUI. I am convinced that he is not now, and probably never has been, a person who shows a “pattern” of intentional “disregard” for the law.

I do not suggest that a “10-year look-back” window is, per se, unreasonable. As recently summarized in Dorn v. Boston Police Department, 31 MCSR 375 (2018), the Commission, in regard to bypass appeals based on driving histories, generally limits the review to the Appellant's driving history within the past ten (10) years, but gives greater weight to the most recent five (5) years. Further, the Commission gives more weight to those infractions related to at-fault accidents and other moving violations where the Appellant has been found responsible. Less weight is given to those entries which may be attributable to socioeconomic factors such as expired registrations, no inspection sticker, etc. which may have no bearing on whether the Appellant can effectively serve in a public safety position. The Commission also attempts to put an Appellant's driving history in the proper context, considering such issues as whether he/she is required to drive more for personal or business reasons. Finally, the Commission reviews the driving histories of other candidates to ensure fair and impartial treatment.

⁷ I note that Candidate G was charged with Reckless Driving in 2008, which New Bedford also did not consider as it fell outside the look-back period. (*Exh.4G*)

Finally, I note that the practice employed here to rely solely on the information contained in an RMV Driver History Report and a Criminal Docket can be problematic. See, e.g., Wine v. City of Holyoke, 31 MCSR 19 (2018); Teixeira v. Department of Correction, 27 MCSR 471 (2014); Gallagher v. City of Leominster, 22 MCSR 123 (2009). The preferred practice often calls for further inquiry and review, such as accessing the relevant incident reports to identify the specific misconduct, especially, when it is the misconduct, and not a conviction that underlies a bypass decision. While the decision in this appeal does not turn on this point, it might bear notice to consider in future hiring decision.

In sum, in the circumstances of this particular case, considering how close this one offense was to the “look-back” window, combined with the record of law-abiding behavior since that one offense, the record does not support a conclusion that Mr. Bruins presents a sufficiently risky “pattern” of behavior that disqualifies him as the Nbfd asserted. Even the Nbfd witnesses relied on the “totality” of the evidence, and acknowledged that the OUI, alone, probably did not justify the bypass.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Joshua Bruins is **allowed**.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of New Bedford in its delegated capacity take the following action:

- Place the name of Joshua Bruins at the top of any current or future Certification for the position of Firefighter with the New Bedford Fire Department (WFD) until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. Bruins is appointed as an Nbfd Firefighter, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below him appointed from Certification No. 06166. This retroactive civil service seniority date is not intended to provide Mr. Bruins with any additional pay or benefits including, without limitation, creditable service toward retirement.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 7, 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:

Joshua Bruins (Appellant)

Elizabeth Pio, Esq.. (for Respondent)

Jennifer Maldonado-Ung, Esq. (HRD)

Regina Caggiano (HRD)