

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PATRICK BURKE,
Appellant

v.

G1-12-306

CITY OF CAMBRIDGE,
Respondent

Appearance for Appellant

Joseph G. Donnellan, Esq.
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Appearance for Respondent

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Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Patrick Burke (hereinafter “Mr. Burke” or “Appellant”), filed an appeal on November 12, 2012, regarding the decision of the City of Cambridge, the Appointing Authority (hereinafter “City” or “City of Cambridge”), to bypass him for appointment to the position of firefighter. The Appellant filed a timely appeal. A pre-hearing conference was held on December 4, 2012 and a full hearing was held on February 12, 2013 at the offices of the Civil Service Commission (hereinafter “Commission”). The hearing was digitally recorded. Both parties submitted post-hearing briefs on April 19, 2013.

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

FINDINGS OF FACT:

Thirteen (13) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the City of Cambridge:

- Gerard Mahoney, Assistant Chief, Fire Department;
- Pamela Morris, Police Officer, Interviewer;

For the Appellant:

- Patrick Burke, Appellant;

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

1. The Appellant, Patrick Burke, is a 28 year old resident of Winthrop, Massachusetts and is a graduate of Winthrop High School. (*Stipulated Facts*)
2. Mr. Burke was an applicant for the position of firefighter with the City of Cambridge. He sat for and passed the firefighter examination in March 2011. (*Testimony of Burke*)
3. Mr. Burke's name appeared on Certification # 202553 for the position as a fire fighter. He is a veteran who was honorably discharged from the United States Marine Corps in September 2010. (*Exhibit 3*)
4. The process used in the 2012 Cambridge Fire Department hiring began with a group meeting on January 26, 2012 with approximately 26 candidates. (*Testimony of Morris*)
5. Mr. Burke filled out the Fire Department's extensive application on January 26, 2012. (*Exhibit 4A*)
6. Mr. Burke was made aware that the Police Department would be performing the background check and that he should provide all relevant information, and any additional

information that may be asked for by the police officers, as soon as possible. (*Testimony of Mahoney*)

7. There was an intake interview on January 26, 2012 of Mr. Burke conducted by Cambridge Police Sergeant Thomas Ahearn, and it was at this time that Mr. Burke was told that he was going to have to produce his employment records. (*Testimony of Burke*)
8. Mr. Burke also signed a certification in the application that his answers are true which also provided that he could be disqualified if his answers or information were found to be untrue. (*Exhibit 5*)
9. Police Officer Pamela Morris was assigned to perform the background investigation of Patrick Burke and exchanged emails with Mr. Burke about the matter of military records and other information needed. (*Exhibit 8*)
10. Applicants who were in the military had to request their own records and they were encouraged in January to do so quickly or in a timely fashion. In Officer Morris' experience, she had at least three applicants with military records who got those records to her within a couple of days. (*Testimony of Morris*)
11. As of March 14, 2012 the investigators had no military records from Mr. Burke. (*Testimony of Morris*)
12. On March 14, 2012, Morris asked Mr. Burke to obtain a variety of information including military records. (*Testimony of Morris, Exhibit 8: March 9 email*)
13. Mr. Burke learned he could print the military record out on-line. He told Morris the morning of March 14th that he was going to the Social Security Administration for his Social Security card. He also told her that he had printed his full military record and that he would be faxing it to her. (*Testimony of Burke and Morris, Exhibit 8: March 14*)

14. The Social Security card Mr. Burke produced on March 20th was stamped “VOID,” and Mr. Burke was directed to produce a valid card. A valid card was issued to Mr. Burke and dated March 23, 2012 but was not provided to Officer Morris until April 19, 2012.
(Exhibits 10A and 10B)
15. Morris sent Mr. Burke two emails on March 14th stating that he could drop off the military records at the station and to get them to her as soon as possible. *(Exhibit 8: March 14)*
16. Mr. Burke went on-line to get his military records on March 18, 2012. *(Testimony of Burke)*
17. Mr. Burke told the background investigators that he faxed a full set of his military records from the fax machine at his mother’s house on March 18, 2012. The Department did not receive this fax and Mr. Burke did not provide the investigators any confirmation that a fax was sent and received. *(Testimony of Morris)*
18. Mr. Burke appeared at the Cambridge Police Department for an interview on March 20, 2012. That interview was tape-recorded. *(Testimony of Burke and Morris)*
19. The interview was conducted by Officer Morris and Sgt. Kelly King, both of the Cambridge Police Department’s Internal Affairs Unit. *(Testimony of Morris)*
20. When Mr. Burke arrived at the interview, he did not bring his military records.
(Testimony of Morris)
21. During the interview on March 20th, Mr. Burke admitted that he lied when he said he had the military records on March 14th and 16th. Officer Morris remarked that she felt this was a waste of time. Sgt. King asked the Appellant to fill out a written statement about why he lied to Detective Morris. Mr. Burke then stated in a written statement: “On Wednesday

I informed Detective Morris that I had my milrecords/OMPF (Official Military Personnel File) ready to fax. I did not actually have them in my possession at that time. I lied and wasted her time.” (*Testimony of Morris and Exhibit 7*)

22. Mr. Burke felt that the interview was hostile and that Sgt. King stated that what he had done was “dumb.” (*Testimony of Burke*)

23. Officer Morris objected to the language used by Sgt. King during the course of the interview as it was not the language that she would use. (*Testimony of Morris*)

24. In the section of his application titled “EMPLOYMENT,” Mr. Burke was required to list all employment and any military service as well as reasons for leaving. (*Exhibits 4A and 6*)

25. Mr. Burke had left his application entry concerning the Marine Corps service “Reason for Leaving” blank. After his interview on March 20, 2012, in the supplemental version of his application, Mr. Burke still left that section blank. (*Exhibit 6, p. 5*)

26. Mr. Burke listed a learning disability in the Education section of his employment application. He wrote “left WHS (Winthrop High School) for an alternative HS due to learning disability.” (*Exhibit 4A, p. 3*)

27. Mr. Burke never discussed with the investigators the nature of the disability nor had he mentioned he had ever taken medication. (*Testimony of Morris and Burke*)

28. Question 24 of the Fire Department’s application has eleven (11) sub-questions about the Applicant’s disciplinary history with other employers. Mr. Burke answered “Yes” to eight (8) of these questions, admitting he had violated rules and regulations; had failed to abide by the policies or procedures of a company or employer; had problems related to attendance or tardiness; had been counseled for poor job performance, attendance, or

other work related issue; had been reprimanded or warned; had quit a job without giving notice; and had been suspended or received disciplinary action. (*Exhibit 4A, p. 7*)

29. In describing the offenses for which he was disciplined, Mr. Burke stated: “I was NJP’ed (non-judicial punishment) for being between 2 and 15 minutes late on 3 occasions in 1 month...” while in the military. (*Exhibit 4A, p. 17*)

30. Mr. Burke’s discipline record included formal written discipline in: 2006, 2007, 2009, and 2010. (*Testimony of Morris*)

31. Officer Morris tried to contact the Appellant’s Marine Corps supervisors but was unable to obtain any additional information. (*Testimony of Morris*)

32. In regard to Mr. Burke’s other employment: he quit two jobs without notice. He quit Tommy Doyle’s Pub stating the reason was that he was “Friends with Manager, got mad, quit at COB” (close of business). Mr. Burke also quit America West when he was vomiting at work and was told by his supervisor that if he left it would be the same as quitting and then Mr. Burke proceeded to leave. He was the third to leave that night. (*Exhibit 6, Testimony of Burke*)

33. The City of Cambridge stated its reasons for bypassing Mr. Burke on September 14, 2012: unsatisfactory employment history; providing misleading information on his application and making false statements during the background investigation regarding his military record in violation of his certification form that his answers were true; and providing incomplete and misleading information on the application regarding prior disciplinary actions as well as omitting several instances of disciplinary action. (*Exhibit 1*)

34. Mr. Burke filed an appeal of the City of Cambridge's decision to bypass him for the position of fire fighter on November 12, 2012.

Discussion

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.” Cambridge v. Civil Service Comm’n, 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, § 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 a 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 Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” *Id.* at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is

not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether 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.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone ... than in disciplining an existing tenured one.” *See City of Attleboro v. Mass. Civil Serv. Comm’n*, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.* (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

The Respondent’s Argument

The City of Cambridge is arguing that its decision to bypass Mr. Burke was reasonably justified. They first argue that his employment history is unsatisfactory. Mr. Burke had been disciplined on several occasions during his tenure in the United States Marine Corps to 2010, constituting a pattern of misconduct. Mr. Burke had also left two previous employers without

giving any notice thus indicating a lack of reliability. Secondly, the City of Cambridge argues that Mr. Burke provided incomplete and misleading information on his application and made false statements during the background investigation regarding his military record. Since Mr. Burke signed a certification of truthfulness and was untruthful during that time the City argues he was automatically disqualified from further consideration and his name was removed from the Civil Service eligibility list. Lastly, the City argues that Mr. Burke provided incomplete and misleading information on his employment application regarding his prior discipline history. The explanations Mr. Burke provided were incomplete and omitted several significant instances of disciplinary action and, as a result, did not describe his disciplinary record; those instances omitted were unauthorized absences in 2006, 2007, and 2010 and for disobeying orders in 2009 in the military.

The Appellant's Argument

Mr. Burke argues that he should not have been bypassed. He received an honorable discharge from the United State Marine Corps for his service to his country. He left America West without notice due to the fact that he was vomiting at work and was told that if he left it would be the same as quitting. When he walked out he was the third to do so that night. Mr. Burke left his other job to pursue to a job in weather science in Antarctica, which relates to his military field of training. Mr. Burke argues that leaving such a menial job to pursue such an opportunity on short notice is not a compelling reason for a bypass. Secondly, Mr. Burke states that the interview with the Cambridge Police Officers assigned to undertake the background process was hostile and involved an officer telling him that what he did was dumb. Mr. Burke also argues he has a learning disability and, consequently, his organizational skills are particularly challenged when it comes to filling out long, complex paperwork. Mr. Burke argues

he was truthful throughout the application process and any omissions in his application were due solely to his being challenged by his learning disability. Lastly, Mr. Burke received only minor non-judicial punishment while in the Marine Corps for not being properly shaven and that cannot be used as a disqualifier for the position of firefighter.

Analysis

A preponderance of the evidence indicates that the City of Cambridge had reasonable justification to bypass the Appellant for appointment to the position of firefighter. While the Appellant may have been honorably discharged from the United States Marine Corps, he still omitted several instances of disciplinary action, no matter how minor they may have been. He also provided incomplete and misleading information on his application. Mr. Burke claims that any omissions or incomplete answers in his application are due to his learning disability. However, he only listed he had a learning disability in the 'Education' section of his employment application but did not specify what the learning disability was. He also did not mention any alleged learning disability in his revised application, nor did he mention in his March 20th interview with the background investigators what the learning disability was. There was no reference as to how that learning disability may have affected how he responded to the information sought by Officer Morris. He has also not been on any medication for it since he was in school.

Mr. Burke also left two previous employers without notice and was disciplined in the Marine Corps on multiple occasions for unauthorized absences and for being late on three separate occasions. If it had just been one instance in which Mr. Burke had left his employer (America West) because he was sick at work, his leaving employment without notice may have been less of an issue. But Mr. Burke explicitly stated in his application that he left Tommy

Doyle's. This indicates volatility and lack of reliability and it is understandable if the City of Cambridge Fire Department would be wary of hiring someone who has been shown to have problems being on time and/or losing his or her temper and quitting.

Lastly, there is the issue where Mr. Burke made false statements to the background investigators in regards to both his military records and his social security card. Telling the background investigators that he had his military records and that he was going to get his Social Security card when he neither had his military records nor had he gotten a valid Social Security card shows a lack of character that is needed to be a firefighter. This is evidenced by Officer Morris' testimony that all other applicants with military records were able to get both their military records and Social Security cards to her within a day or two of being asked. Mr. Burke's testimony in regard to the interview being hostile may have some merit, however, and is backed up by Officer Morris' testimony. Although that argument alone does not make up for Mr. Burke stating he had the records when he did not, part of the interview may have been somewhat improper. Treating an applicant as though he were the subject of a criminal investigation, as the Appellant alleged, rather than an employment investigation may be intended to illustrate how a candidate deals with stressful situations but it should have reasonable boundaries and not involve telling a candidate that what he or she has done is "dumb."

CONCLUSION

For the above reasons, the Appellant's appeal under Docket No. G1-12-306 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on February 6, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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)(l), 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 (30) 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.

Notice:

Joseph Donnellan, Esq. (For Appellant)

Philip Collins, Esq. (For Respondent)

John Marra, Esq. (HRD)