

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**ANDREW BUTLER,**  
*Appellant*

v.

**CITY OF GLOUCESTER,**  
*Respondent*

**Case No.: G1-13-149**

**DECISION**

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).


Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the City of Gloucester to bypass Mr. Butler for original appointment to the position of fire fighter is affirmed and Mr. Butler's appeal under Docket No. G1-13-149 is hereby ***denied***.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on April 3, 2014.

A true record. Attest.

  
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Christopher C. Bowman  
Chairman

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)(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-day time limit for seeking judicial review of this Commission order or decision.

**After careful review, and in accordance with our Standard Governing Disclosures of Sensitive Personal Data, the Commission has opted to redact sections of this decision to appropriately balance the Appellant's privacy interests with the Commission's statutory obligation to provide the public with a transparent record of its deliberative process and interpretation of civil service law.**

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 to:

Mark Nestor, Esq. (for Appellant)

Victoria Caldwell, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk. ss.

Division of Administrative Law Appeals

**Andrew Butler,  
Appellant**

v.

Docket Nos. **CS-13-487 (DALA),  
G-1-13-149 (Civil Service Commission)**

**Gloucester - Fire Department,  
Respondent/Appointing Authority**

Dated:

**Appearance for Appellant:**

**Mark L. Nestor, Esq.**  
45 Middle Street, Suite 1  
P.O. Box 5357  
Gloucester, MA 01930

**Appearance for Appointing Authority:**

**Victoria B. Caldwell, Esq.**  
Gloucester City Hall - Law Department  
Nine Dale Avenue  
Gloucester, MA 01930

**Administrative Magistrate:**

**Sarah H. Luick, Esq.**

**Summary of Recommended Decision**

The Respondent was justified in bypassing the Appellant for an original appointment to fire fighter. The hiring process followed to evaluate the Appellant was the same process used for all the candidates. The Appellant was able to address the circumstances of his military discipline and criminal background in answering the questions on his job application and when he was in front of the interview panel. There was no pre-textual reason for bypassing the Appellant. The justifiable reasons for his bypass were the underlying conduct involved in his criminal background and in his military discipline, and his lack of full candor in presenting details about this underlying conduct. I recommend that this bypass appeal be dismissed.

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31, § 2(b), the Appellant, Andrew Butler, filed an appeal with the Civil Service Commission on June 27, 2013 to review the merits of the April 30, 2013 decision

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of the Appointing Authority, the City of Gloucester, to bypass him for an original appointment to the position of fire fighter. G.L. c. 31, § 27. (Exs. C, 19, 20 & 21.) A hearing was held on October 4, 2013 for the Civil Service Commission at the offices of the Division of Administrative Law Appeals (DALA), One Congress Street, 11th Floor, Boston, MA 02114. The hearing was digitally recorded.<sup>1</sup>

Various documents are in evidence. (Exs. 1 – 23. Exhibit 23 is U.S. Marine Corp Articles 92 and 111, and Exhibit 24 is the Gloucester Fire Department Rules and Regulations governing general conduct and discipline, both submitted post-hearing.) The Respondent presented the testimony of Gloucester employees; Human Resources Director Sally Polzin, and Fire Chief Eric Smith. The Appellant testified on his own behalf. The parties entered into some stipulations of fact (Ex. C.), filed pre-hearing memoranda, made closing arguments on the record, and filed briefs by November 25, 2013 when the record closed. (Exs. A & B.)

### **FINDINGS OF FACT**

Based on the evidence presented and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Andrew Butler, born in 1986, currently owns a landscaping business in Gloucester. He is married with children. He lived in Mississippi, graduating from high school there before entering the U.S. Marine Corps. He enlisted in April 2004 but needed to first finish high school. Among the reasons he entered the military were to serve our country and then consider going for a college education. He did not start his military service for over a year after enlisting. (Exs. C & 1. Testimony of Butler.)

2. By his own admission, Mr. Butler engaged in conduct during his youth that he regrets. He engaged in the misuse of alcohol and illicit drugs. While in Mississippi, he was

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<sup>1</sup> The Appellant's brief contains a transcript of the digital recording. (Ex. A.)

charged at age eighteen with two counts of malicious mischief involving property destruction. He was arrested on May 23, 2005 and arraigned September 16, 2005. One of the charges was dismissed. On the other charge he was found guilty with the court ordering a six month jail sentence to be suspended if he met the condition of making restitution of \$4,308.58 within a week and completing his entrance into the U.S. Marine Corps. If the conditions were not satisfied, he would face the jail time. He satisfied the conditions. This criminal case was a reason for the delay in the start of his U.S. Marine Corps service. (Exs. C, 1, 3, 10, 11 & 17. Testimony of Butler.)

3. Mr. Butler started his U.S. Marine Corps service on October 11, 2005. He was deployed in combat service for a year and five days, and separated from service with an honorable discharge on January 4, 2010. At the time of his separation, he had completed his required active service. He went to basic training and infantry school. He was deployed to Fallujah, Iraq between January 6, 2007 and January 28, 2008. He drove military vehicles in combat operations and was a machine gunner and radio operator. He supplied security in a combat environment. He had a military driver's license to drive large and heavy military vehicles. (Exs. C & 3. Testimony of Butler.)

4. Mr. Butler received military discipline for misconduct during his U.S. Marine Corps service. During the Thanksgiving time period of November 27 to December 2, 2006, Mr. Butler went AWOL, leaving his military base to go home to Mississippi. For having done this, he lost seven days of pay and worked an extra seven days. He did not appeal this discipline. (Ex. 7. Testimony of Butler.) On September 27, 2007, while in Fallujah, Mr. Butler was engaged in "huffing" from a can of pressurized air." This was found to be a violation of the Uniform Code of Military Justice (MCMJ) rule and regulation, Article 92, for failure to obey an order. He did

not appeal this discipline. (Ex. 8. Testimony of Butler.) In June 2007, Mr. Butler went home to Mississippi for two weeks. [REDACTED]

[REDACTED] On September 9, 2009, Mr. Butler was stationed in North Carolina. He engaged in drunk and reckless driving near Snead's Ferry, NC. He was driving a passenger car and not wearing a seat belt. He was not charged criminally for driving under the influence of alcohol or for reckless driving, but he was found in violation of direct military orders under Article 92 for drinking and driving, and for not using a seatbelt. He was also found in violation of Article 111 for reckless driving. He acknowledged his misconduct, received a reduction in rank but had no loss of pay. He received a warning that he would receive a monetary punishment if he got into more trouble. His military license was not forfeited. (Exs. C, 1, 7, 8, 9 & 17. Testimony of Butler.)

5. In connection with the September 2009 conduct, Mr. Butler was injured and spent time out of military service to recover. When he left military service, he received an 80% disability rating. About 50% of that was for post-traumatic stress disorder (PTSD). He also had tinnitus, ankle and pelvis conditions. He received treatment for the PTSD from the Veterans Administration (VA) for about six months. His current disability rating is now at 90% with the primary condition being PTSD. (Exs. C & 4. Testimony of Butler.)

6. After ending his military service, Mr. Butler came to live in Gloucester. On June 9, 2011, he was stopped by a Danvers police officer for driving on the wrong side of the road. He was under the influence of alcohol. He had a Mississippi driver's license he showed to the police officer. He failed sobriety tests done at the scene. He was arrested and handcuffed, charged with driving under the influence of alcohol which the police officer could smell. He was also charged

with failure to keep right while driving. After being advised of his rights, he took a breathalyzer test that confirmed he was under the influence of alcohol. Mr. Butler was sent to a sixteen week alcohol recovery program, completed it, and the case was dismissed June 2012. (Exs. C, 1, 12, 13 & 17. Testimony of Butler.)

7. Mr. Butler had an interest in obtaining a public safety job, and took the April 28, 2012 civil service examination for fire fighter. He received a score of 99 with both veteran and disabled veteran status. He was tied for first place in his rank on certified list #00402 that was sent to the Gloucester Fire Chief, Eric Smith, who had permission to hire two original appointment fire fighters. Mr. Butler signed that he would accept the appointment if offered to him. (Exs. C, 5, 14, 15 & 22. Testimony of Smith, Polzin & Butler.)

8. Mr. Butler was provided with the multi-page application form that each candidate for this fire fighter position received. He was able to take the application home to complete it and had a deadline date to return it. General questions the candidates might have about the application were answered by the Gloucester Human Resources Department. No specific meeting was held with each candidate to address whether or not the application questions were sufficiently answered. Mr. Butler inquired whether or not he had sufficiently answered the application questions and understood from the Human Resources Department that the answer to that would emerge from the interview process. When he turned in his application to the Human Resources Department he offered to answer any questions about his application responses if needed. He was not contacted by anyone to do that. (Exs. C & 1. Testimony of Butler & Polzin.)

9. In his application, Mr. Butler answered yes to question #10 that he had been “dismissed, suspended or expelled from a school, college, or university,” but did not explain underlying circumstances about what happened on an additional response form. (Ex. 1.)

10. In his application under “Employment Record,” Mr. Butler answered yes to question #30(h), that he had been “disciplined by an employer for any reason.” He did not provide any explanation on an additional response form. (Ex. 1.)

11. In his application under “Driving Record,” Mr. Butler answered yes to questions about getting “a written warning from a police officer ... a citation from a police officer in Massachusetts ... a citation from a police officer outside of Massachusetts ... involved in an automobile accident in any state,” indicating “10” such accidents. He also answered yes to being “charged or convicted of driving a vehicle while under the influence of alcohol or drugs ... [and having a] license to operate a motor vehicle ever ... suspended or revoked in this State or any other.” The application sought for any yes response, “the City/Town/State, and/or Court/Jurisdiction and/or Amount.” Mr. Butler listed Danvers, MA-Salem District Court – unknown amount; Sneads Ferry, NC – Onslow County Court/Jurisdiction – unknown amount; Madison, MS – Madison, MS Court/Jurisdiction – unknown amount; and some other listing that was cut off in the copy of the application. No further explanation was provided in an additional response form. (Exs. C, 1 & 17. Testimony of Butler.)

12. In his application under “Military Record,” Mr. Butler revealed that he had “served on active duty in the Armed Forces,” listing the Marine Corps with the highest rank being lance corporal and with active duty from October 10, 2005 to January 4, 2010. He listed his discharge as honorable. He answered yes to question #34 that asked if he had “ANY type of disciplinary action taken against you while in the military service.” Question #34 required him to “write or type your version of the incident on an additional response form. Be sure to number your response to match the number of the particular applicable question.” Mr. Butler wrote: “While serving in the military I received disciplinary action for unauthorized absence and violation of



direct orders. I went home for Thanksgiving without permission. I also violated direct orders.” He did not write about any other military discipline he received in providing his explanation to question # 34. (Exs. C, 1 & 17. Testimony of Butler.)

13. In his application under “Court Record,” Mr. Butler answered yes to the questions asking he had ever been “summonsed into court for any criminal offense,” “arrested for violation of a criminal law,” and “arrested but have never been tried for a criminal.” To the question of whether he had ever been convicted of simple assault, or of speeding, or for an affray, or for disturbing the peace, or for disorderly conduct, he answered that he had been convicted of speeding. The application sought a full explanation of incidents where he answered yes by using an additional response form. He was to include the nature of the action and the court. Mr. Butler wrote:

When I was 18 ... before I was in the Marine Corps, I was arrested for simple assault because another young man followed my brother to my house and threatened my brother. We later ran into each other at a friend’s house. We argued about the incident. Later, he told friends that I ‘better watch my back.’ We later bumped into each other at another mutual friend’s house. That is where the fight took place. He then left and went to the police station. The police later came to my house, asked questions. I turned myself in about a week later when a warrant was issued. The charges were later dropped.

Mr. Butler also explained in the additional response form:

When I was 18, I was intoxicated. I destroyed someone’s property. I was arrested for the offense. I went to court, charges were dropped and I paid for the damages I had done.

Mr. Butler further explained in the additional response form: “I have had speeding tickets. All of which I have pled guilty [to] and paid.” (Exs. C, 1 & 17. Testimony of Butler.)

14. In his application under “Drug Use/Experimentation,” Mr. Butler at question # 50 answered that he had used or possessed marijuana, cocaine, ecstasy, hallucinogens, other illegal drugs, and tobacco. (Exs. C, 1 & 17. Testimony of Butler.)

15. In his application under “Use of Alcohol,” Mr. Butler at question #52 answered yes to having been “involved in an accident while under the influence of alcohol.” In the additional response form, he explained: “I was involved in a motor vehicle accident while I was drinking. I was the driver. I do not have a DUI from it. Alcohol was involved so therefore the answer is yes.” (Exs. C, 1 & 17. Testimony of Butler.)

16. In his application under “General Behavior,” Mr. Butler answered yes at question #53 to ever having gambled. [REDACTED]

[REDACTED] In an additional response form he explained: “I have gambled scratch tickets & the occasional Powerball. It is rare and do not have gambling debt.” He explained in addition: [REDACTED] (Ex. 1.)

17. After submitting his application, Mr. Butler went to his scheduled interview on March 11, 2013. He went before Fire Chief Eric Smith, the Gloucester Human Resources Director Sally Polzin, and Deputy Fire Chief Thomas Aiello. This was the same panel that each candidate went before. Each candidate was asked standard questions prepared in advance. The application of each candidate being interviewed was available to the panel. Chief Smith reviewed Mr. Butler’s application prior to the interview but not in great detail. Only after the interview process would the candidate be subject to a background investigation done by a Gloucester Police Officer who produced investigation reports on the candidates. (Exs. C, 5 & 20. Testimony of Smith, Polzin & Butler.)

18. Besides answering the standard questions asked of him by the interview panel, Mr. Butler volunteered an assessment of his younger years in Mississippi. He told the panel that he had made very poor decisions at times when he was not in a right state of mind. He explained how he knew he had to change and decided to join the U.S. Marine Corps. Chief Smith’s

assessment from the interview was that Mr. Butler had answered acceptably the standard questions and had presented himself as a reformed positive young man who had left any questionable conduct behind once he joined the military. He was courteous and showed a determination to do well as a fire fighter and to be part of a brotherhood in this small fire department. His prior military service was viewed as a positive. The other panel members agreed. Mr. Butler did not address any details about the underlying conduct he had engaged in of drug and alcohol use while in the military that led to being disciplined. He did not discuss his Danvers Police Department arrest and charge of driving under the influence of alcohol from June 2011 after the end of his military service. Mr. Butler was sent onto the physical and psychological examinations and physical abilities evaluations. (Exs. C, 5 & 6. Testimony of Smith, Polzin & Butler.)

19. Mr. Butler signed the required release forms for his background investigation that was done by Lt. Michael A. Williams, Jr. of the Gloucester Police Department. In addition to producing a report on his findings for the hiring process, Lt. Williams reached a recommendation about hiring Mr. Butler. This was the same process followed for each candidate who reached the level of the background investigation. (Exs. C, 2, 3, 4 & 17. Testimony of Polzin, Butler & Smith.)

20. In recommending in his report that Mr. Butler “be disqualified from the hiring process,” Lt. Williams relied on Mr. Butler’s criminal record and his military discipline record, including incidents involving his alcohol, drug use, and dangerous driving. Lt. Williams supported his conclusions with documentation as well as relying on the information Mr. Butler provided in his application. (Exs. C, 1, 7, 8, 9, 10, 11, 12, 13 & 17. Testimony of Polzin & Smith.)

21. Lt. Williams listed in his report to support disqualifying Mr. Butler, the admission in the application that he used or possessed marijuana, cocaine, ecstasy and hallucinogens. Lt. Williams listed Mr. Butler's arrest in May 2005 in Mississippi with the charge of malicious mischief for which he "was found guilty," that Lt. Williams noted was "a felony in Mississippi." Lt. Williams noted that for this offense he received a six month jail sentence that "was suspended on the condition" that he "complete the entrance process for the Marine Corps and pay full restitution of \$4,308.58." Lt. Williams concluded Mr. Butler's explanation for this incident in his application was misleading, noting that Mr. Butler acknowledged being arrested for the offense and that he went to court, but that he claimed the " 'charges were dropped and I paid for the damages I had done.' " Lt. Williams listed Mr. Butler's June 2011 charge of "operating under the influence of intoxicating liquor by the Danvers Police Department" that resulted in the suspension of Mr. Butler's driver's license and that he failed a breathalyzer test. Lt. Williams noted that Mr. Butler's criminal case was resolved by being "continued without a finding." Lt. Williams emphasized that this was Mr. Butler's "second instance of alcohol involvement while operating a motor vehicle." (Exs. 1, 10, 11, 12, 13 & 17.)

22. Lt. Williams found Mr. Butler's military discipline to also support a disqualification from hire. In his report, Lt. Williams discussed three events when Mr. Butler received punishment for violations of the UCMJ while in the Marine Corps. Starting with the application question #34 that asked if there had been any kind of discipline received while in the military, Lt. Williams found Mr. Butler's explanation addressed being AWOL at Thanksgiving in violation of direct orders but did not include the full details about the incident. Lt. Williams learned that he "was punished for unauthorized absences and received 7 days restriction, 7 days extra duty, forfeiture of 7 days pay totaling \$350." Lt. Williams noted that in explaining his response to

question #34, Mr. Butler did not also list two other incidents where he received discipline for violating UCMJ. Lt. Williams wrote in his report that in September 2007, Mr. Butler was caught huffing from a can of pressurized air and “punished with a reduction in rank to E-2, forfeited ½ months pay for two months and received 45 days extra duty.” Lt. Williams explained that huffing involves abusing “chemical inhalants to achieve feelings of intoxication, euphoria, and other symptoms.” (Exs. 1, 7, 8, 9 & 17.) Lt. Williams reported that in September 2009:

[Mr. Butler] was charged under the UCMJ for failure to obey an order which stemmed from wrongfully drinking and driving, and failing to wear a seat belt ... charged [also] with drunken and reckless operation of a vehicle in a wanton manner as to endanger persons and property ... was punished with a reduction in rank to E-2 (2<sup>nd</sup> time), forfeiture of \$984 per month for two months, totaling \$1,568 and 60 days restricted duty.

(Ex. 17.)

23. Article 92 of UCMJ at 10 USC §892 that Mr. Butler violated while serving in the U.S. Marine Corps, is titled, “Failure to Obey Order or Regulation”:

Any person subject to this chapter who –

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
- (3) is derelict in the performance of his duties;

Shall be punished as a court-martial may direct.

Article 111 of UCMJ at 10 USC § 911 that Mr. Butler violated while serving in the military, is titled, “Drunken or Reckless Operation of a Vehicle, Aircraft, or Vessel,” and contains a description of the kind of conduct involved:

(a) Any person subject to this chapter who –

- (1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance ... or
- (2) operates or is in actual physical control of any vehicle, aircraft, or vessel

while drunk or when the alcohol concentration in the person's blood or breath is equal or exceeds the applicable limit under subsection (b),

shall be punished as a court-martial may direct.

(Ex. 23.) In his application, Mr. Butler did not make reference to the particular Articles of UCMJ that he had violated. (Ex. 1.)

24. Chief Smith reviewed and relied upon Lt. Williams' investigation report. Chief Smith decided there was no need to recall Mr. Butler to the interview panel for a chance to explain why he did not reveal the full details of his past misconduct in the military and the full details of his criminal cases. Chief Smith concluded Mr. Butler had been less than candid and complete in addressing his misconduct in the application information he provided as well as at the interview panel. He concluded that the kinds of misconduct that the criminal charges and the military discipline involved were too recent and were not acceptable conduct for a fire fighter. He conferred with Ms. Polzin regarding his conclusions about Mr. Butler and she was in agreement. Chief Smith decided and Ms. Polzin agreed, that Mr. Butler would not be offered the appointment. By this time he had passed the physical examination, physical testing, and psychological evaluation required as part of the hiring process. Because of this decision concerning Mr. Butler, a candidate who ranked below Mr. Butler on certification list #00402 was offered the appointment and accepted it. This other candidate had gone through all the processes Mr. Butler had undergone. A bypass letter of April 30, 2013 to Mr. Butler was composed by Human Resources Director Polzin with the agreement of Chief Smith. The letter contained Mr. Butler's appeal rights. (Exs. C, 18, 20 & 24. Testimony of Smith & Polzin.)

25. In the bypass letter Mr. Butler was informed:

Your work history and driving record, as well as your prior drug use and arrests, all show a pattern of conduct which is incompatible with service as a public safety official in Gloucester. In addition, your responses to questions during the

application and interview process demonstrate a lack of full candor regarding incidents of concern that occurred just prior to and while you were serving in the military.

The letter listed the illicit drugs acknowledged by Mr. Butler that he had used. It noted the huffing of the can of pressurized air. It noted the military punishment for the huffing incident of a reduction in rank, loss of pay and extra duty days. The letter noted how the application did not list the details of his military discipline. The letter noted the drinking, driving and failure to wear a seatbelt along with drunken and reckless driving that involved military punishment about two years later that again involved a reduction in rank, loss of pay and extra duty days. The letter noted that these two disciplines were not set forth in the application or explained at the interview, and that the only military discipline explained in the application was going AWOL over a Thanksgiving holiday. The letter discussed the June 2011 charge of operating under the influence of intoxicating liquor by the Danvers, MA Police Department with a license suspension and failure of a breathalyzer test. The letter discussed the Mississippi criminal matter from 2005 and that Mr. Butler's discussion of that event in the application did not reflect the full outcome of the case which involved a felony charge with property destruction, and a condition of avoiding six months of jail time only if restitution was made and Mr. Butler followed through and started his military service. The letter pointed out that Mr. Butler had referred to the case as the charges being dropped once restitution was made. The letter informed Mr. Butler that "a candidate below your name from certification number 00402 for the position of fire fighter" would be appointed. (Ex. 20.) Mr. Butler filed a timely appeal of this bypass decision on June 27, 2013. (Exs. C & 21.)

26. The City of Gloucester relied upon the decision reached by Chief Smith to bypass Mr. Butler for appointment for the reasons in the bypass letter. (Exs. C & 19. Testimony of

Smith & Polzin.)

27. The candidate chosen who had ranked below Mr. Butler is also a disabled veteran who served in the U.S. Air Force from November 16, 2004 to November 16, 2008, and who received an honorable discharge. He has no military discipline while in the service. He has no criminal record. He acknowledged having used or possessed marijuana and no other drugs. He ranked third on the certification list # 00402. (Exs. C, 15 & 18.)

28. Both Chief Smith and Human Resources Director Polzin had prior experience with hiring public safety employees. Chief Smith had commenced his employment as the Gloucester Fire Chief in July 2012 after service with the Westland, Michigan Fire Department for twenty-one years and reaching the rank of Deputy Chief. (Testimony of Smith & Polzin.)

29. If he had been asked, Mr. Butler would have provided more detailed information about the conduct that led to criminal charges and about his military misconduct. (Testimony of Butler.)

### **Conclusion and Recommendation**

I conclude the reasons reached by Chief Smith that were relied upon by the City of Gloucester to bypass Mr. Butler were justifiable and reasonable. All the candidates for the original position of fire fighter went through the same steps during the hiring process. These procedures provided adequate opportunity for a candidate to communicate pertinent background information about themselves including about any incident or background factor the candidate wanted to expand upon. This expansion of explanation was to be done through supplemental pages to the application and/or during the panel interview process. Heading into this hiring process Chief Smith had criteria he wanted the candidates to satisfy. He properly followed the list of candidates provided to the City of Gloucester by the Human Resources Division in



certification list #00402 starting with the highest ranked candidates.

The police background investigation stage in the hiring process only occurred after both the application and interview stages. Mr. Butler had no opportunity to be questioned by the interview panel about information the investigation revealed, including no opportunity to question the police investigator about what was uncovered. No one connected with the hiring process reviewed the application in any detail with the candidate before it was available to the interview panel. Mr. Butler contends that the hiring process used was inherently flawed because it was unfair to the candidate. Mr. Butler contends that he did not provide misleading information about his military discipline involving the huffing and the drunk and reckless driving incidents, because neither incident involved criminal charges and involved as he listed, violations of the UCMJ and direct orders. He contends that had someone asked for it, he would have explained at his interview or added in his application, information about the underlying conduct involved in the military discipline including adding information about the punishments he received.

The findings show that Mr. Butler left his application and interview process never having revealed to the hiring panel and in particular, to Chief Smith, the pertinent misconduct and punishment information that was only revealed through Lt. Williams' investigation. It goes against common sense for Mr. Butler to have assumed the details about his misconduct, especially while in the military and including the punishments he received, would not be information that would have an impact on whether or not he would be hired for a public safety position, particularly when the information revealed through the investigation involved huffing, drinking, and reckless driving. Chief Smith found at the interview that Mr. Butler emphasized his misconducts as occurring in his youth with all of them overcome once he entered the U.S.

Marine Corps. He had been involved in a drunk driving situation after he left the military in 2011. The hiring process may not have provided the candidate with a “second bite of the apple” opportunity to reveal details when directly questioned about them by an interview panel reconvened following their receipt of the investigation report, but that does not mean the hiring process was flawed.

In light of facing details in questions from a police investigation report, no doubt Mr. Butler would not have denied such details. The findings sufficiently prove he did not provide such details in his application or at his interview. As Chief Smith concluded, this showed a lack of full candor in presenting his background. That was just one reason why Chief Smith determined that Mr. Butler would not be a suitable candidate to be a fire fighter. The other reason was simply the nature of his misconduct as sufficiently revealed by the investigation report, and the fact that some of it was recent.

The candidate who was hired over Mr. Butler was also a disabled veteran whose rank was one number on the list lower than Mr. Butler, and who did not have the background of military discipline, problematic alcohol use, and criminal arrests that Mr. Butler has in his background. There has been no proof that the hire of this candidate was done through arbitrarily or intentionally for improper reasons, deciding to engage in a process that would cause the bypass of Mr. Butler.

Mr. Butler’s candidacy had positive aspects to it that Chief Smith took into consideration. Mr. Butler had a neat appearance and demeanor at the interview. He was polite, asserted a determination to do well as a fire fighter, and his answers well the standard questions each candidate was asked. His ranking sheets and comments done following his interview show this. His military service and disabled veteran status were also taken into consideration. After his

interview there was no reason found not to have him go onto the next steps in the hiring process of the physical and psychological evaluations, which Mr. Butler passed, and to move onto his background investigation.

The City of Gloucester relied on the recommendation of Chief Smith and bypassed Mr. Butler. In doing so the City acted justifiably and not arbitrarily. I did not find the hiring process was flawed by Mr. Butler not being given an opportunity to return to the interview panel to explain the concerns that grew out of the content in the background investigation report. I did not find that he had sufficiently answered and explained his past misconducts in his application or at his interview. Chief Smith was provided credible testimony to explain why he felt a need to recommend that Mr. Butler be bypassed. I do not conclude that it is unreasonable to hold Mr. Butler to have recognized a need to be more forthcoming and provide details about his misconducts within his application or at his interview. I conclude that the kind of misconduct that emerged from Lt. Williams' investigation involves behaviors that Chief Smith credibly explained do not fit sufficiently well with being a fire fighter, particularly as they are misconducts involving substance abuse and poor driving that occurred within and after military service.

When an Appointing Authority bypasses an otherwise eligible candidate it must provide both a reasonable justification for doing so, as well as proof that such a justification could be applied fairly to all potential candidates. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241 (2001); *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). In hearing bypass appeals, the Civil Service Commission must determine whether the Appointing Authority has "sustained its burden of proof that there was reasonable justification for the action taken." *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304. Reasonable

justification requires that the Appointing Authority base its actions on adequate reasons, supported by creditable evidence, guided by common sense, and weighed by an unprejudiced mind. See *Wakefield v. First District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Service Commission v. Municipal Court of Boston*, 359 Mass. 214 (1971). In sustaining its burden of proof, the Appointing Authority must prove its justification by a preponderance of the evidence. G.L. c. 31, § 2(b). I conclude the Respondent/Appointing Authority's proof satisfies these standards for its bypass determination.

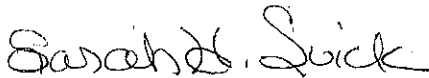
When applying reasonable criteria, Appointing Authorities are granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission cannot substitute its views and preferences for those of the Appointing Authority. *Burlington v. McCarthy*, 60 Mass. App. Ct. 914 (2004). Rather, the Civil Service Commission's role is to "protect against overtones of political control, objectives unrelated to merit standards, and assure neutrally applied public policy." *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304; *Revere v. Civil Service Commission*, 31 Mass. App. Ct. 315, 321 (1991); *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). The Civil Service Commission reviews the legitimacy and reasonableness of the Appointing Authority's grounds for bypassing an Appellant. *Beverly v. Civil Service Commission*, 8 Mass. App. Ct. 182, 187 (2010). So long as the Appointing Authority provides sound and sufficient reasons for the bypass and applies its policies equally, the Civil Service Commission should not intervene.

Mr. Butler showed his genuine desire to become a Gloucester fire fighter. Perhaps he felt justified in not emphasizing in his application and at his interview, all the details of his criminal and military misconduct. He seems to be very committed to not engaging in any future misconduct, particularly as to behaviors that would impair his ability to drive fire engines and be

able to be fully engaged in critical fire fighting at the scenes of fires and other emergencies. Nevertheless, I do not conclude that the reasons relied upon to bypass Mr. Butler are pretextual or arbitrary. I do not find the hiring process or the application questions or interview occurring before the background investigation was done to show a flawed hiring process to block the bypass decision.

For these reasons, I recommend that the Civil Service Commission affirm the action taken by the Appointing Authority and dismiss Mr. Butler's bypass appeal.

**DIVISION OF ADMINISTRATIVE  
LAW APPEALS**



**Sarah H. Luick  
Administrative Magistrate**

Dated: **FEB 20 2014**