

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

SCOTT CARTON,
Appellant

v.

**TOWN OF
WATERTOWN,**
Respondent


Case No.: G2-11-314

DECISION

The Civil Service Commission (Commission) voted at an executive session on September 20, 2012 to acknowledge receipt of: 1) the Recommended Decision of the Administrative Law Magistrate dated July 23, 2012; 2) the Appellant's Objections to the Recommended Decision; and 3) the Respondent's Response to the Appellant's Objections. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on September 20, 2012.

A true record Attest



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)(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.

Notice to:

Stephen S. Churchill, Esq. (for Appellant)

Joseph S. Fair, Esq. (for Respondent)

John Marra, Esq. (HRD)

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



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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July 23, 2012

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Scott Carton v. Town of Watertown
DALA Docket No. CS-12-339
CSC Docket No. G2-11-314

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CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Joseph S. Fair
Scott W. Carton

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SCOTT W. CARTON,
Petitioner

v.

TOWN OF WATERTOWN,
Respondent

Appearance for Petitioner:

Pro se

Appearance for Respondent:

Joseph S. Fair
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
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Administrative Magistrate:

Angela McConney Scheepers, Esq.

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Docket No: G2-11-314
CS-12-339

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SUMMARY OF DECISION

The Town of Watertown had reasonable justification for bypassing the Appellant for the position of permanent full-time Lieutenant. I therefore recommend that the Civil Service Commission dismiss the appeal.

DECISION

INTRODUCTION

Pursuant to the provisions of M.G.L. c. 31, § 2(b), the Appellant, Scott W. Carton (hereinafter "Appellant") seeks review of the Town of Watertown's (hereinafter "Appointing Authority" or "Town") reasons for bypassing him for promotional appointment to the position of Lieutenant in the Watertown Fire Department. A pre-hearing was held on December 13, 2011 at the offices of

the Civil Service Commission. A full hearing was held on January 23, 2012 at the offices of the Division of Administrative Law Appeals (DALA). The hearing was digitally recorded.

FINDINGS OF FACT

Ten (10) exhibits were admitted into evidence. The Respondent's prehearing memorandum was marked "A" for identification. After the hearing, the record was left open in order for the Appellant to submit Family Medical Leave Act requests. Upon receipt of those requests by DALA on January 31, 2012, the record was closed. The requests are marked "B" for identification, but are not admitted into evidence due to their lack of relevance.

The Appellant submitted a post-hearing brief on April 18, 2012. The Respondent submitted its post-hearing brief on May 4, 2012.

Based on the documents admitted into evidence and the testimony of:

For the Appointing Authority:

- Mario Orangio, Chief of the Watertown Fire Department
- Anthony Gianotti, former Provisional Fire Chief of the Watertown Fire Department

For the Appellant:

- Firefighter Scott W. Carton, Appellant

I make the following findings of fact:

1. On July 29, 1999, the Appellant became a permanent full-time firefighter for the Town. He is trained as a Firefighter I and II. (Exhibit 12; Testimony of the Appellant)
2. Before he became a firefighter, the Appellant served as an Emergency Medical Technician for a private ambulance company in Watertown. (Testimony of Appellant)
3. The Appellant took the promotional examination for the position of Lieutenant on November 21, 2009 and received a score of 80. The state Human Resources Division (HRD) issued

- Certification 09192011 on May 14, 2010. The Appellant ranked fourth. (Exhibits 1, 10 and 12; Testimony of Appellant)
4. After the Appellant was bypassed for the position of Temporary Lieutenant in 2010, he filed an appeal with the Civil Service Commission. *Carton v. Watertown*, G-11-54 (April 21, 2011). The Appellant, Watertown Firefighters Association, Local 1347 (hereinafter “Union”), and the Town entered into a Memorandum of Agreement wherein the Town agreed not to consider FMLA leave as sick time in future promotional opportunities in exchange for the Appellant withdrawing his appeal. The Town did not admit to any wrongdoing or liability. (Exhibit 8; Testimony of Appellant)
 5. The Appellant testified that had he not been improperly bypassed, he would have had the opportunity for five months experience as Acting Lieutenant. (Testimony of Appellant)
 6. In September 2011, the Town identified a vacancy for the position of Fire Lieutenant. (Testimony of Chief Orangio)
 7. At that time, the first two candidates on Certification 09192011 had been promoted. As a result, the Appellant was then ranked first on the list. (Exhibit 11; Testimony of Chief Orangio)
 8. In making his recommendation to the Town Manager for the Lieutenant appointment, Chief Orangio considered each candidate’s attendance record, experience, training, commendations and disciplinary history. (Testimony of Chief Orangio)
 9. In a memorandum to the Town Manager on September 14, 2011, Chief Orangio recommended that the Appellant be bypassed in favor of Firefighter Paul R. Bourque (hereinafter “Bourque”). (Exhibits 1 and 11)

10. On October 13, 2011, the Town Manager informed the Appellant that he had accepted Chief Orangio's recommendation to appoint Bourque to the Lieutenant's position. (Exhibit 1)
11. The selected candidate, Bourque, is currently serving in the United States Navy overseas, and so was unable to participate in the interview process. (Exhibits 1 and 11; Testimony of Chief Orangio)
12. In the Town's conditional offer of employment, Bourque (1) must successfully complete his current military service and (2) successfully complete the remainder of the promotional process by participating in an interview upon his return. (Exhibit 1)
13. Until Bourque meets these conditions, the position will be a provisional one. (Exhibits 1 and 11)

Town's Reasons for Choosing Selected Candidate Paul Bourque

14. Bourque has been a permanent full-time firefighter since January 20, 2000. He is also a certified emergency medical technician. (Exhibit 1; Testimony of Chief Orangio).
15. Bourque has no history of discipline. (Testimony of Chief Orangio)
16. Bourque served as a Temporary Lieutenant from September 2009 to October 2010, and from January through May of 2011. Chief Orangio testified that he performed well on both occasions. (Exhibit 1; Testimony of Chief Orangio)
17. Bourque is certified as a Fire Officer I and Fire Officer II by the National Fire Prevention Academy (NFPA). These certifications involve training of over thirty-six hours, and are designed to provide a firefighter with the knowledge and skills needed to serve as an officer in the fire service. (Exhibit 1; Testimony of Chief Orangio)
18. Bourque underwent these trainings on his own initiative and received no increase in pay for obtaining these new skills. (Testimony of Chief Orangio)

19. Chief Orangio testified that these certifications, which were not required by the Fire Department, showed Bourque's high level of commitment and responsibility. (Testimony of Chief Orangio)
20. Bourque is also certified as a Fire Instructor I and Fire Instructor II by the NFPA. (Exhibit 1; Testimony of Chief Orangio)
21. The Fire Instructor I and Fire Instructor II certifications involve trainings over sixty hours long, and teach firefighters how to train others. (Testimony of Chief Orangio)
22. Again, Bourque underwent these trainings on his own initiative, and received no increase in pay. (Testimony of Chief Orangio)
23. It is Fire Department practice that the junior fire Lieutenant serves as the Department's Training Officer. Chief Orangio testified that Bourque's Fire Officer and Fire Instructor trainings would prove invaluable in this assignment. (Testimony of Chief Orangio)
24. Bourque is an instructor at the Massachusetts Fire Academy. He teaches the Gas Safety Program at the Massachusetts Maritime Academy. (Exhibit 1; Testimony of Orangio)
25. With the chief's permission, Bourque conducted gas safety training at the Fire Department for the firefighters. (Exhibit 1; Testimony of Orangio)

Town's Reasons for Bypassing Appellant Scott W. Carton

26. Chief Gianotti (hereinafter "Chief Gianotti") served for thirty-five years in the Fire Department (hereinafter "Department"), and had achieved the rank of provisional chief by his retirement. (Testimony of Chief Gianotti)
27. He had known the Appellant from the time the Appellant had joined the Department in 1999. (Testimony of Chief Gianotti)

28. Under the CBA, "sick leave" is defined as an "absence due to sickness or injury not related to employment." (Exhibit 6 at 7 (Appendix A)).
29. Ninety firefighters were employed in the Department in 2003. When he conducted a review of firefighter sick leave that year, Chief Gianotti found a pattern that twelve of the firefighters combined sick time with other time off or called in sick immediately following an overtime shift. (Testimony of Chief Gianotti)
30. The Appellant was one of those firefighters. On July 14, 2003, Chief Gianotti and Deputy Chief Barrett met with him to discuss the matter. Chief Gianotti informed the Appellant that this behavior would not be tolerated and gave him a verbal warning. (Exhibit 4; Testimony of Gianotti)
31. It is the practice of the Department that verbal warnings are not placed in the employee's personnel file. The chief keeps his own notation of verbal warnings in his records. (Testimony of Gianotti)
32. Thus the verbal warning was not placed in the Appellant's personnel file, but the chief kept a notation of it in his records. (Exhibit 4; Testimony of Gianotti)
33. On September 8, 2003, Chief Gianotti and Deputy Chief Barrett met with the Appellant and a union representative to discuss the fact that the Appellant had called in sick after an overtime shift. Chief Gianotti gave him another verbal warning. This was not placed in the Appellant's personnel file, but the chief made a notation in his records. (Exhibit 4; Testimony of Gianotti)
34. After Chief Orangio became chief of the Department in February 2004, the Fire Department conducted another review of sick time abuse. (Testimony of Orangio)

35. The Town Manger was concerned about attendance issues in the Department. Absences by firefighters were costing the Town three to four million dollars per year in overtime pay.

(Testimony of Orangio)

36. There is no prohibition against bundling time off, i.e., sick time in conjunction with other time off, pursuant to the CBA. (Exhibit 6; Testimony of Orangio)

37. In March 2004, Chief Orangio met with the Appellant and let him know that he was concerned about his pattern of calling in sick before and after personal days, vacation days or overtime shifts. (Testimony of Orangio; Exhibit 2)

38. Notwithstanding this conversation and his verbal warnings from the previous chief, the Appellant continued his pattern of sick leave. (Testimony of Orangio)

39. On July 19, 2005, Chief Orangio issued a written warning to the Appellant. The chief imposed a requirement that the Appellant had to provide a doctor's note for any future sick leave, in accordance with the CBA, Appendix A, SICK LEAVE, § (c):

The Chief of the Department or the Town Manager may require the presentation of a doctor's certificate or report in writing, under oath, in connection with any claim for sick leave benefit ...

(Exhibit 2; Testimony of Orangio)

40. Based on the recommendations of Deputy Chief Bartlett and Captain Merullo, and the Appellant's perfect attendance since their last discussion, on February 20, 2006, Chief Orangio rescinded the doctor's note requirement for each use of sick leave. (Exhibit 5; Testimony of Orangio)

41. By December 2008, a Department attendance investigation again showed a pattern in which the Appellant's sick-leave use doubled after the exhaustion of his personal allotment. On December 22, 2008, Chief Orangio issued another written warning to the Appellant, and

reinstated the doctor's note requirement. The Appellant was also advised to submit the appropriate documentation to the Personnel Department if his sick leave was in conjunction with the FMLA. (Exhibit 3; Testimony of Orangio)

42. The Appellant did not file a grievance after receiving either the July 19, 2005 or the December 22, 2008 written warning. He testified that he did not do so because the total of his sick leave included excused absences under the FMLA. (Testimony of Appellant; Testimony of Orangio)

43. At the time of the bypass, the doctor's note requirement was still in effect. (Exhibit 1)

44. On October 25, 2011, Appellant filed a timely appeal of the Town's decision to bypass him. (Exhibit 11)

CONCLUSION AND ORDER

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 Serv. 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 Civ. Serv. 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 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 Serv. Comm’n*, 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983); see *Commissioners of Civ. Serv. v. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. *Beverly v. Civil Serv. Comm’n*, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown.

The Town was reasonably justified in bypassing Appellant for the position of permanent Lieutenant in the Watertown Fire Department.

The Town presented valid reasons for bypassing the Appellant and selecting Bourque. In his September 14, 2011 memorandum to the Town Manager, Chief Orangio stated that Bourque had served extremely well when he served as a temporary lieutenant from September 2009 through October 2010 and from January through May of 2011; that he had a letter of recognition from a member of the public in his file; that he has been an extremely reliable asset to the Department; that he takes initiative when completing tasks; that he actively participates in Department training; that he has achieved the certifications of NFPA Fire Officer I and II, and NFPA Fire

Instructor I and II through the Massachusetts Firefighting Academy; that he teaches the gas safety program at the Massachusetts Maritime Academy; and that he has taught gas safety training to the firefighters at the Department. All of these skills, in addition to the fact that he had never been disciplined, provided the Town with sound and sufficient reasons that Bourque was the better qualified candidate.

The fact that Bourque possesses a higher level of training and knowledge than Appellant is further reason by itself to justify Appellant's bypass. *See Anthony v. Springfield*, 23 MCSR 201 (2010) (Selected candidate's command experience provided the City with reasonable justification to bypass the Appellant) The Department's junior Lieutenant is expected to serve as the Training Officer. Because of Bourque's certifications as a Fire Officer I and II and Fire Instructor I and II, he already has the capacity to do so. This additional training, pursued on his own initiative, shows that Bourque possesses a higher level of initiative and commitment to the Department in comparison with the Appellant.

It also cannot be overlooked that Bourque has no disciplinary history. It is well-established that disciplinary history and sick leave misuse are valid reasons for bypassing a candidate. *See Kennedy v. Pittsfield*, 22 MCSR 729 (2009) (Appellant had problematic disciplinary record in contrast to the selected candidate's superior background); *McKeown v. Boston Police Dep't*, 21 MCSR 51 (2008) (Appellant's bundling of sick time with time off resulted in a horrendous attendance record that provided reasonable justification for his bypass)

In this case, Chief Gianotti had verbally warned Appellant on two occasions in 2003 about his using sick leave after having worked an overtime shift. Notwithstanding these warnings, Appellant continued to misuse sick leave and was issued a written warning by Chief Orangio in 2005. As part of that discipline, Chief Orangio required that Appellant also submit a doctor's

note for any subsequent use of sick leave until further notice. By February 2006, Appellant had improved his attendance, so the chief rescinded the medical note requirement. However, by December 2008, the Appellant's sick leave issues were such that Chief Orangio issued another written warning to him and reinstituted the doctor's note requirement. The Appellant did not file a grievance in regard to these disciplines.

The Appellant argues that the bypass was not justified. It is true that the Appellant received a higher score on the civil service exam. That, in and of itself, is not enough. The Appellant argued that he was penalized for taking sick time, excused under the FMLA, immediately after serving overtime shifts. I left the record open at his request in order for the Appellant to submit the approved FMLA times. However, the Appellant could not provide documentation to show that he was granted FMLA leave for the times that he was disciplined.

The Appellant has argued that there is no prohibition in the CBA against taking sick leave immediately after an overtime shift. However, he knew that his supervisors disapproved of this behavior because of the strain it placed on the available manpower and the costs to the Town in overtime pay. He knew that this "bundling" of overtime and sick time was the subject of at least two investigations by the Department.

The Appellant did not dispute that he received reprimands for his absences from work in the form of verbal reprimands and written warnings, and that he was required to submit physician letters for future sick leave absences. As a matter of fact, at the time of the bypass, the Appellant was on the doctor's note requirement again. The Appellant also argued that the verbal warnings were not valid because they were not placed in his personnel file. This argument lacks merit.

Although the Appellant acknowledges that the selected candidate has eighteen months experience in a supervisory position while he has none, the Appellant points out that his chance

for supervisory experience was lost when he was improperly bypassed in 2010 for the position of temporary lieutenant. The Appellant, the Union and the Town entered into a Memorandum of Agreement after that bypass was found to be improper, agreeing in effect not to compute excused FMLA time as sick time for future promotional purposes.

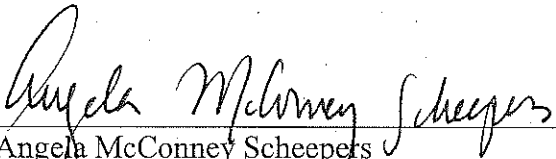
While Appellant does not dispute that the above-referenced disciplines took place and that he failed to challenge them via the grievance process or through civil service, he nonetheless attempted to revisit their merits at the hearing. The hearing was not the proper time to consider those arguments at such a late date.

There is no evidence that the Town's decision was based on political considerations, favoritism or bias. Thus the Town's decision to bypass the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that the Town was reasonably justified in bypassing the Appellant. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS


Angela McConney Scheepers
Administrative Magistrate

DATED: **JUL 23 2012**