

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

PAUL DEFARIAS,
Appellant

v.

CITY OF GLOUCESTER,
Respondent

G1-22-065

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 and the parties had thirty days to provide written objections to the Commission. The Appellant submitted an objection on November 7, 2022, to which the Respondent replied on November 28, 2022.

After careful review and consideration, the Commission voted (4-1) to affirm and adopt the Tentative Decision of the Magistrate thus making this the Final Decision of the Commission.

For the reasons stated in the Magistrate's Tentative Decision, the Commission's majority agrees that the City of Gloucester had reasonable justification to bypass the Appellant for original appointment to the position of Firefighter. This does not prevent the Appellant from applying for this position in the future.

The Appellant's concerns with the thoroughness of this investigation resonate with the Commission. It is perplexing that the City's investigators did not request personnel files from any employer. Moreover, the Appointing Authority's bypass letter unjustifiably stated that the Appellant had attendance issues at a former employer, which is not accurate. It is also of real concern that, prior to the evidentiary hearing, the Appointing Authority failed to produce crucial evidence—namely, the notes and checklists used by the background investigators—despite numerous requests from counsel for the Appellant. While the Magistrate offered a curative process and these notes were eventually received and carefully reviewed by the Commission, they should not have been withheld until after the full hearing.

However, the Magistrate correctly utilizes the test for upholding a bypass amidst a flawed investigation in his decision. The decision of an Appointing Authority to bypass an Appellant despite its failure to conduct a reasonably thorough investigation may be upheld when (1) the Appointing Authority was motivated by proper, merit-focused considerations; and (2) substantial reasons driving the Appointing Authority's decision are demonstrated on appeal to be meritorious. See *Sherman v. Town of Randolph*, 472 Mass. 802, 810-813 (2015). As stated in *Sherman*:

A [personnel] decision may be reasonably justified on the merits, even where the appointing authority uses flawed procedures for selecting candidates, in the following limited circumstance: where the appointing authority had a reasonable justification on the merits for deciding to bypass a candidate, and the flaws in the selection process are not so severe that it is impossible to evaluate the merits from the record. In such a case, the candidate's bypass appeal should be denied despite the presence of procedural flaws, because the appointing authority comported with "the fundamental purpose of the civil service system, ... to ensure decision-making in accordance with basic merit principles."

472 Mass. at 813 (quoting *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-265 (2001)). Here the Magistrate permissibly concluded that it was not impossible to evaluate from the totality of record evidence the merits of the parties' contentions on whether sound and sufficient justification for the bypass existed.

There is no evidence in the record that the City of Gloucester was driven by political considerations, favoritism, or bias in its bypass of the Appellant. As for the second prong of the *Sherman* test, the Commission agrees that the Appointing Authority had reasonable justification to bypass the Appellant. As indicated by the record and testimony from city officials, the City of Gloucester takes negative references from previous employers very seriously. While at least three personal references and even a few professional references gave positive reviews of the Appellant, it is undisputed that the Appellant was terminated from Cataldo Ambulance, left Beauport Ambulance rather precipitously following a conflict with a supervisor, and failed to earn an unqualified recommendation from a Captain who supervised him in the Lynnfield Fire Department. The preponderance of the reliable evidence, showing that the Appellant sparked concerns at three of his former employers, all of which implicated similar duties to what would be expected of him in Gloucester, demonstrates that a bypass in this situation was proper.

The Commission majority notes that it is not departing in any manner from the standard established by the Supreme Judicial Court for upholding a municipality's hiring bypass decision. Rather than merely relying upon a "sufficient quantum of evidence" to substantiate "legitimate concerns" about the risk of a candidate's misconduct or shortcomings, here the Commission is holding the City of Gloucester to its statutory obligation, "as required by G.L. c. 31, § 2(b), [to] demonstrate reasonable justification for the bypass of [the Appellant] by a preponderance of the evidence." *Boston Police Department v. Civil Service Commission*, 483 Mass. 461, 478 (2019). After affording the Magistrate, as fact-finder, appropriate deference on credibility judgments and in weighing all of the record evidence, the Commission is satisfied that the Magistrate's preponderance of the evidence determination is warranted.

The decision of the City of Gloucester to bypass the Appellant is affirmed and the Appellant's appeal under Docket No. G1-22-065 is hereby *denied*.

By a majority (4-1) vote of the Civil Service Commission (Bowman, Chair - Yes; Dooley, Commissioner – Yes; McConney, Commissioner – Yes; Stein, Commissioner – No; and Tivnan, Commissioner - Yes) on January 26, 2023. Commissioner Stein's dissent is appended.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

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.

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 to:

James E. Neyman, Esq (for Appellant)

Suzanne P. Egan, Esq. (for Respondent)

James P. Rooney, Esq. (acting Chief Administrative Magistrate, DALA)

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CITY OF GLOUCESTER,
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DISSENTING OPINION OF COMMISSIONER STEIN

I respectfully dissent. I agree with the majority's conclusion that the DALA Magistrate appropriately determined that the Appellant's bypass was not made after a thorough review of his qualifications as required by basic merit principles. I also agree with the Commission's conclusions that the City wrongfully withheld relevant information about the details of the negative employment information supplied by certain employers that formed the basis for the bypass as well as other information from those employers and other sources that weighed positively in the Appellant's favor, most of it until after the Commission had concluded the evidentiary hearing of his appeal. I also concur with the Commission majority that the Supreme Judicial Court's decision in Sherman v. Town of Randolph, 472 Mass. 802, 810-813 (2015) (*Sherman*); and the Commission's decision in St. Dennis v. City of Worcester, 29 MCSR 448 (2016) (*St. Denis*) is the authority that prescribes the appropriate standard that must be met in order for the Commission to sustain a bypass, notwithstanding the failure of an appointing authority to conduct the proper thorough review required by basic merit principles.

I depart from the majority, however, because I find that the standard set forth in *Sherman* and *St. Denis* has not been met here.

First, I do not accept the Magistrate's two-pronged legal analysis of *Sherman*, endorsed by the Commission majority, insofar as it holds that, despite a failure to conduct a reasonably thorough investigation, a bypass should be upheld when "substantial reasons driving the Appointing Authority's decision [were] demonstrated on appeal to be meritorious". In my view, this test for excusing the failure to conduct a proper review is NOT consistent with the holding or intent of the SJC. It unduly expands the holdings in *Sherman* and *St. Denis* and, I believe,

undermines other important jurisprudence governing the Commission’s review of bypass decisions based on *disputed* issues of fact that distinguish the present appeal from those other decisions.¹

Second, the reasons for the Appellant’s bypass stated in the bypass letter (and the background investigator’s two-page report) were summarily stated to be limited to reports from prior employers that revealed “you were terminated and/or allowed to resign for . . . poor attendance; issues and poor demeanor with coworkers; and the inability to learn quickly and show progress.” (*Resp. Exhs. 9 & 10 (R0106-R0109)*). There was no mention that the Appellant had been terminated by any employer because of a conflict with a supervisor. (All the City’s witnesses thought the problem was mainly patient care). Upon de novo review, the Appointing Authority is limited to the specific, written reasons stated in the bypass letter – 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).

Third, as the Appellant and the DALA Magistrate point out, the City’s investigators relied entirely on hearsay telephone interviews with three employers and did not request personnel files, incident reports or other follow-up confirmation from any employer about any of the generically described criticisms relayed to the investigators. The investigators stopped further investigation after receiving this generic negative information because *the investigators concluded* that three such negative reports from employers was, in effect, a per se justification to bypass the Appellant. The investigators passed along only this negative information to the decision-maker, omitting all the information that was favorable to the Appellant that had been obtained from the three employers, from other employers, and otherwise, during the background investigation. The Appellant was interviewed *before* the background investigators had spoken to his employers and he was never provided with an opportunity to address the generic negative reports later received. Moreover, the Appointing Authority’s bypass letter unjustifiably stated that the Appellant had attendance issues at a former employer, which the DALA Magistrate found was demonstrably untrue. The City’s withholding evidence persisted through the DALA hearing, when, despite repeated requests from counsel for the Appellant, the City failed to produce crucial evidence—namely, the notes and checklists used by the background investigators that turned out to contain relevant information favorable to the Appellant. (*See Post Hearing Exh. 29 (correspondence between counsel regarding discovery)*)

Fourth, the Appellant’s Objections point to a substantial amount of evidence favorable to the Appellant that detracts from the conclusion that the bypass was reasonably justified but which the Tentative Decision does not address or explain why it was discredited, including, in particular, all of the Appellant’s very specific testimony and documentary evidence proffered to explain why the conclusory statements in the background report and bypass letter used to justify the bypass are erroneous and do not accurately represent his employment history. (*App. Exhs. 3 through 7 (A0031-A0043); App. Exhs. 13 through 17 (A0054-A0063); Resp. Exh. 8 (R0071-R0075; Post-Hearing Exh. 29 (106 unnumbered pages submitted by Respondent and offered by Appellant); Testimony of Appellant*)

¹I do accept the Magistrate’s conclusion that the so-called first prong, i.e.. bias, was not proved by a preponderance of the evidence.

For example, the Appellant produced an evaluation received six months prior to his leaving Beaufort Ambulance Company, signed by the same “owner” who purportedly gave one of the investigators a negative reference, but who had written in the performance evaluation that he found the Appellant was “Overall good. Needs to improve on ‘accepting’ advice from others. No better/no worse than anyone else” and who approved the Appellant for an above-average pay raise. (*Compare App.Exh.7 (A0043) with Post Hearing Exh.29 (Beauport interview notes) and Testimony of Lt. Williams and Trefry*) The Appellant provided un rebutted testimony that he had been selected as a FTO (field training officer) for that company and left the company on his own accord after a supervisor asked him to perform an unsanitary and unprofessional act. (*Testimony of Appellant*) The Appellant produced a posting from the webpage of the Lynnfield Fire Department for whom he had worked as a call firefighter, where he had been reported that he was “let go or resigned” because he was not “catching on”, which posting showed him doing “an excellent job demonstrating to the crew his proficiency” operating a fire apparatus. (*Compare App.Exh.14 (A0057) & Testimony of Appellant App.Exh.7(A0043) with Post Hearing Exh.29 (Lynnfield interview notes and Testimony of Lt. Williams and Trefry)*) The Appellant provided un rebutted testimony that he explained to the Fire Chief when he left that employer because he was about to start clinical training for his paramedic license (which he received) and he would be required to perform full-time shifts on multiple days that precluded his ability to accept “on call” assignments. (*Testimony of Appellant*) He admitted his termination from Cataldo Ambulance but provided a plausible, legitimate explanation. (*Resp.Exh.8 (R0075); Testimony of Appellant*)

When applicable law is applied to these facts of the case, I find that the Appellant’s bypass cannot be sustained as consistent with basic merit principles. The standard for review of a bypass, such as the present one, in which the alleged reasons for bypass based on prior employment history was *not* based on a thorough review and *are disputed*, is different from one in which the reasons supporting the bypass were made after a thorough review and/or are not disputed. As the Commission majority noted, in Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 477-78 (2019) (*Boston Police Dept*), the Supreme Judicial Court considered, among other issues, the degree of deference that a law enforcement appointing authority deserves from the Commission, when it serves as a de novo fact-finder in a bypass appeal. By a 6-1 decision, the SJC’s majority opinion questioned the notion that an employer need not look behind an applicant’s prior employment termination (embraced previously by the Appeals Court in City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189 (2010) (*Beverly*) and rejected the conclusion that, when a case comes before the Commission on disputed facts regarding a candidate's past conduct, the appointing authority “need only provide a ‘sufficient quantum of evidence to substantiate its legitimate concerns’ regarding that candidate . . . rather than providing reasonable justification by a preponderance of the evidence [that the misconduct actually occurred] as required by G. L. c.31,§2(b). . . . It is error to apply any standard other than a preponderance of the evidence [that the misconduct actually occurred] in this context.” *Id.*

In St. Dennis v. City of Worcester, 29 MCSR 448 (2016), the Commission found numerous flaws in the hiring process, some similar to those found by the Magistrate in this appeal:

“The Police Chief (who was not called as a witness) likely relied primarily, if not solely, on the negative information contained in the “short form” [investigation report] prepared by Officer Miranda. That is troubling, because the de facto decision-

maker here (the Police Chief) did not fully evaluate all aspects of Mr. St. Dennis's background, including his years of military service, positive references and employment history. While years of precedent-setting decisions have established that the Appointing Authority should be given substantial deference regarding what weight to give negative factors, when compared against positive factors, there is an assumption, and expectation, that the decision-maker has reviewed both. Here, I do not believe that happened.

“Third, the City . . . never even spoke with [the Appellant] as part of the background investigation. That is particularly troubling when, as is the case here, some of the reasons for bypass rely on uncorroborated statements, including those [purportedly] made by Mr. St. Dennis's father. . . .” *Id.* (emphasis added)

What distinguishes *St. Dennis* from the present appeal is the Commission's further finding that, despite these flaws, the City did rely on separate reasons that are “undisputed or not credibly denied by Mr. St. Dennis.” *Id.* These undisputed facts included (1) a record of a one-year c.209A restraining order against the Appellant which was supported by a sworn affidavit attesting to the Appellant's acts of domestic abuse and his own testimony that he “broke down” on the occasion in question; (2) Appellant's admission to making derogatory remarks about women and Middle Eastern men; and (3) undisputed evidence of a poor credit history. Thus, the Commission was clear that its decision in *St. Dennis* represented the exception, not the rule.

“ This is one of those rare cases where, notwithstanding a flawed selection process, the City's decision should be affirmed. Had there been a factual dispute regarding more of the incidents . . . the result here likely would have been different. The City should not . . . view this decision as a stamp of approval of its flawed selection process which, forthwith, should undergo an internal review and revamp to ensure, on a going forward basis, that all candidates receive the fair, impartial and thorough review that is consistent with a merit-based selection process. *Id.* (emphasis added)

Similarly, in *Sherman*, the Supreme Judicial Court rested its decision on the fact that, in that promotional bypass for police sergeant, undisputed evidence had been introduced which established that the Appointing Authority had received evaluations by his supervisors critical of his past job performance. The SJC held:

“A promotional decision may be reasonably justified on the merits, even where the appointing authority uses flawed procedures for selecting candidates, in the following limited circumstance: where the appointing authority had a reasonable justification on the merits for deciding to bypass a candidate, and the flaws in the selection process are not so severe that it is impossible to evaluate the merits from the record.” *Id.* (emphasis added)

The SJC also made clear that “[t]his would be a much closer case . . . if the [flawed interviews] were the only justification offered for the bypass decision. *Id.*

Unlike *Sherman* and *St. Dennis*, the reason for the Appellant's bypass are not undisputed and are not independent of the flaws in the selection process. Here the lack of a thorough review – e.g., failure to conduct more than a cursory telephone inquiry into the Appellant's job history,

no attempt to obtain personnel records or incident reports to corroborate the verbal reports, a cherry-picked investigative report provided to the decision-maker who never was provided the opportunity to review both the positive and negative information, no opportunity for the Appellant to respond to the negative reports – are, in my opinion, inextricably intertwined with the flawed process and, in my view, make it “impossible to evaluate the merits from the record”, i.e., to reach a conclusion based on the preponderance of all the relevant evidence of the truth of the Appellant’s alleged prior employment problems, precisely the situation contemplated in Sherman that the SJC called “a much closer case.” Although it may not be the Commission majority’s intent, I am concerned that, to uphold this bypass, made upon an extremely flawed and, in part, erroneous review (i.e., attendance issues) for reasons that were substantially and materially disputed, would take an unwarranted step backward and dilute the mandate established by the SJC in Boston Police Dep’t. I believe it important to state for the record that, in the future, appointing authorities should not conclude that a failure to conduct the required review ab initio prior to a bypass decision will be excused so long as the appointing authority later cures the deficiency to the Commission’s satisfaction as part of the “de novo” review by the Commission.

Thus, I would allow this appeal and afford the Appellant at least one additional opportunity for consideration after a proper and reasonably thorough review of his qualifications at the appointing authority level. My dissent is premised exclusively on the right of every applicant to such a process that is consistent with basic merit principles. I express no opinion on the merits of the Appellant’s qualifications. It may well be that, upon appropriate heightened scrutiny and appropriate percipient evidence of his alleged prior employment deficiencies, when fairly weighed against his positive attributes, the City may well be justified to find the Appellant unsuitable and, in such case, the City would be entitled to appropriate deference in that decision by the Commission. I remain convinced that the Appellant deserves that opportunity.

/s/ Paul M. Stein
Paul M. Stein
Commissioner

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Paul DeFarias,
Appellant,

No. CS-22-0233 (G1-22-065)

Dated: October 6, 2022

v.

City of Gloucester,
Respondent.

Appearance for Appellant:

James E. Neyman, Esq.
76 Canal Street
Boston, MA 02114

Appearance for Respondent:

Suzanne P. Egan, Esq.
9 Dale Avenue
Gloucester, MA 01930

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF RECOMMENDED DECISION

The appellant applied for a position in the respondent city’s fire department. A background investigation revealed negative information about the appellant’s performance at three prior positions. Based on that information, the city bypassed the respondent and appointed a lower-ranked candidate. The city’s review of the appellant’s candidacy was not “reasonably thorough”: the appellant was not given an opportunity to address the city’s negative findings, and the appointing authority did not review any positive information about the appellant. Even so, the city’s bypass decision is not reversible, because the city’s motives were proper and substantial reasons for its decision were proven valid at the hearing.

RECOMMENDED DECISION

The City of Gloucester bypassed appellant Paul DeFarias for original appointment to the position of firefighter/paramedic in the city’s fire department. Mr. DeFarias appealed to the Civil Service Commission, which referred the appeal to DALA. An evidentiary hearing took place on July 28, 2022. The witnesses were: Mr. DeFarias; his mother, Annette DeFarias; the

city's human resources director, Holly Dougwillo; its fire chief, Eric Smith;² and two of its police officers, Lieutenant Detective Michael Williams and Detective Jonathan Trefry. I admitted into evidence exhibits marked A3-A28 and R1-R11. Post-hearing, I admitted an exhibit marked A29 on Mr. DeFarias's motion. The record closed upon the submission of hearing briefs.

Findings of Fact

Background

The following background is essentially undisputed.

1. Mr. DeFarias grew up in Massachusetts and in Florida. He is twenty-four years old. He is a licensed EMT and paramedic, and is currently taking classes toward an associate's degree at Northern Essex Community College. He has performed EMT and/or firefighting work for several employers. (Exhibit R8; Paul DeFarias; Annette DeFarias.³)

2. During March 2022, the City of Gloucester published four vacancies for firefighter/paramedic positions in the city's fire department. The Human Resources Division (HRD) certified a ranked list of eligible applicants on March 22, 2022. Mr. DeFarias was not on that list. HRD amended its list on March 30, 2022 to add Mr. DeFarias and one other applicant.

² Mr. DeFarias's hearing brief may be read as including a motion to strike Chief Smith's testimony. The background to that request is testimony from Annette DeFarias to the effect that Chief Smith conversed with other witnesses before taking the stand. A sequestration order was in effect; accordingly, a post-hearing order established a schedule for various motions, including motions "for relief relating to the sequestration order." Even if Mr. DeFarias had complied with that schedule, Chief Smith's testimony would not have been stricken. The witnesses were not instructed about the meaning of the sequestration order. And the scraps of conversation that Mrs. DeFarias described offered no reason to suspect that Chief Smith testified falsely.

³ Citations to the testimony, which has not been transcribed, are by witness name only. The testimonies of Mr. DeFarias and his mother are cited by their full names.

They both had only recently obtained their paramedic certificates. (Exhibits R2, R5-R7; Dougwillo.)

3. Each candidate on HRD's list was assigned a ranking number from 1 to 22. Mr. DeFarias's number was 16. Each candidate interested in the open positions was required to visit the city's offices, sign a copy of the candidate list, and collect application materials. Mr. DeFarias and four other candidates did so. One of them later accepted employment elsewhere. (Exhibits R2, R5-R7; Dougwillo; Smith.)

4. In Gloucester, the authority to appoint fire department personnel lies with the mayor. As a practical matter, it is the mayor's practice to adopt the hiring recommendations made by Chief Smith. (Dougwillo; Smith.)

5. In turn, Chief Smith relies on the Gloucester Police Department to conduct background investigations of applicants for fire department positions. The investigation concerning Mr. DeFarias was assigned to Lieutenant Williams. He was assisted by Detective Trefry. Lieutenant Williams and Detective Trefry are experienced officers with training in background investigations. (Exhibit R9; Smith; Williams; Trefry.)

6. In the course of their investigation, the detectives corresponded with eight police departments other than Gloucester to collect police records relating to Mr. DeFarias. They verified Mr. DeFarias's educational history through correspondence with two high schools he attended. They spoke by telephone to six of Mr. DeFarias's prior employers and to three of his personal references. (Exhibit A29; Williams; Trefry.)

7. It is the detectives' practice to run criminal-history and driving-history checks as part of each background investigation. For unknown reasons, the detectives did not run these

queries on Mr. DeFarias. However, Mr. DeFarias himself included a driving-history record in his employment application. (Exhibits A29, R8; Williams; Trefry.)

8. Much of the information the detectives collected was positive. They discerned nothing of note in the police and educational records they assembled. Mr. DeFarias's personal references praised him as a model student, a "straight arrow," and a hard worker. His former supervisor at Kelly's Roast Beef called him an "all-around genuine kid," noting that he was once named employee of the month. His current supervisor at Zartech, where Mr. DeFarias is a shop technician, said that he is mature, honest, and generally an "outstanding guy." A reference at the volunteer fire department of Montverde, Florida reported that Mr. DeFarias was well-liked, exhibiting good attendance and a positive work ethic; Mr. DeFarias served that department as an on-call volunteer during early 2017. (Exhibit A29; Trefry.)

9. In Massachusetts, Mr. DeFarias has performed EMT and/or firefighting work for three employers: Cataldo Ambulance Service (Cataldo), Beauport Ambulance Service (Beauport), and the Lynnfield Fire Department (Lynnfield). Each of these employers provided Lieutenant Williams and Detective Trefry with partly negative reviews of Mr. DeFarias. The facts relating to Mr. DeFarias's work for each employer are analyzed *infra*. (Exhibit A29; Williams; Trefry.)

10. The fire department interviewed its candidates before the background investigations were complete. Chief Smith led the interview of Mr. DeFarias. Two additional officers participated. The interview was unremarkable, although Chief Smith was not satisfied with Mr. DeFarias's account of the reasons for his separation from employment with Cataldo. Mr. DeFarias was told at the interview that a background investigation was ongoing; he was invited to make any additional remarks that might anticipate the investigation's findings. There

was also some discussion at the interview about the open position’s likely start date and benefits. (Dougwillo; Smith; Paul DeFarias.)

11. Lieutenant Williams prepared an investigation report dated April 19, 2022. The report summarized the negative information that Lieutenant Williams and Detective Trefry had obtained about Mr. DeFarias’s work for Cataldo, Beauport, and Lynnfield. Based on that information, Lieutenant Williams recommended against offering Mr. DeFarias a position. (Exhibit R9; Williams; Trefry.)

12. Chief Smith reviewed the investigation report and was persuaded not to hire Mr. DeFarias. Ultimately, the department appointed three candidates, including one whose ranking was lower than Mr. DeFarias’s. A bypass letter sent to Mr. DeFarias provided the following explanation: “A reference check with prior employers revealed that you were terminated and/or allowed to resign for various reasons: poor attendance; issues and poor demeanor with coworkers; and the inability to learn quickly and show progress.” (Exhibit R10; Dougwillo; Smith.)⁴

⁴ Soon before the hearing, the city moved to dismiss, arguing that Mr. DeFarias actually was not bypassed. The argument relied on the fact that HRD’s amended certificate of March 30, 2022 listed the two new candidates, including Mr. DeFarias, at the foot of the original list (of March 22, 2022). Based on this formatting choice, the city argued that Mr. DeFarias’s name was “lowest” on the certificate—physically—among the candidates who expressed interest in the open position. The commission denied the motion to dismiss, and the city has not presented facts or argument supporting reconsideration. *Cf. Damas v. Boston Police Dep’t*, No. G1-16-121, at 7-8 (CSC Dec. 8, 2016) (no candidate is considered to appear “higher” on a list than other candidates identically ranked).

Disputed Allegations

The parties' dispute concentrates on the allegations collected by the city relating to Mr. DeFarias's work for Cataldo, Beauport, and Lynnfield. The following paragraphs address the evidence relating to these allegations in a less conclusory, more evaluative manner.⁵

13. *Cataldo Ambulance Service.* Mr. DeFarias worked for Cataldo full-time from August 2018 to March 2019 (five months). There is no dispute that his employment was terminated. The circumstances of the termination are hazier. It is clear that Mr. DeFarias was at first suspended pending an investigation into a complaint about an interaction between him and a patient. A preponderance of the evidence supports the conclusion that he was terminated later on the same day because he reacted to the suspension antagonistically—declining to leave the premises promptly, and instead demanding documentation about his suspension. This explanation is outlined in a contemporaneous termination note. It is corroborated in part by Mr. DeFarias's portrayals of the incident on his employment application and at his employment interview. (Exhibits A3, A5-A7, A28, R8; Williams; Smith.)⁶

⁵ Findings 13-15 rely to varying degree on hearsay declarations relayed at the hearing through the credible testimony of Lieutenant Williams and Detective Trefry. Mr. DeFarias's objections to these declarations were not meritorious. As a constitutional matter, he was afforded the right to summon the declarants to be cross-examined. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 530-31 (1988). Even post-hearing, an order authorized Mr. DeFarias to file motions "to recall witnesses" and "to summon new witnesses." As an evidentiary matter, an administrative decision may rest on hearsay bearing "indicia of reliability." *Embers of Salisbury*, 401 Mass. at 530. The pertinent declarations were not detailed; but (a) they reflected the declarants' personal observations; (b) they were corroborated by other evidence (as described *infra*); and (c) the declarants had no conceivable motive to fabricate negative information about Mr. DeFarias. *See Commonwealth v. Patton*, 458 Mass. 119, 132-33 (2010); *Doe v. Sex Offender Registry Bd.*, 95 Mass. App. Ct. 85, 89-90 (2019). *See also George v. City of Lynn*, No. G1-05-435, at 29, 33 (CSC Nov. 20, 2008) (no adverse inference may be drawn from the declarants' absence).

⁶ I do not find that Mr. DeFarias's attendance at Cataldo was problematic, as suggested in Lieutenant Williams's report and the city's bypass letter.

14. *Beauport Ambulance Service.* Mr. DeFarias worked for Beauport part-time from April 2019 to December 2020 (twenty months). The detectives spoke to two individuals at this business. A preponderance of the evidence supports the conclusion that Mr. DeFarias was terminated as a result of repeated clinical errors, accompanied by personality conflicts between him and his coworkers. This account was the confident recollection that the business's owner gave Lieutenant Williams. It was corroborated in part by the information that Mr. DeFarias's direct supervisor gave Detective Trefry. (Exhibits A28, R8; Williams; Trefry.)⁷

15. *Lynnfield Fire Department.* Mr. DeFarias was a "call" firefighter for Lynnfield from October 2018 to June 2021 (32 months). A captain at Lynnfield who spoke to Lieutenant Williams complimented Mr. DeFarias's work ethic and suggested that Gloucester should "give him a shot." But when asked about Mr. DeFarias's performance, the captain said that Mr. DeFarias had "trouble catching on." He stated that these difficulties would make him disinclined to rehire Mr. DeFarias in the future. The captain added that Mr. DeFarias had "a few issues with peers." A preponderance of the evidence supports the conclusion that these observations were accurate. The captain clearly was not biased against Mr. DeFarias; and his concerns were consistent with the problems reported at Beauport. (Exhibits A9-A11, A28; Williams.)

Analysis

The civil service system is designed "to guard against political considerations, favoritism, and bias in governmental employment decisions." *Boston Police Dep't v. Collins*, 48 Mass.

⁷ On his employment application, Mr. DeFarias wrote that he left Beauport to return to school. At the hearing, he testified that he quit after a supervisor disciplined him for refusing to urinate in a less-than-private location. An implication of this testimony is that Mr. DeFarias's application contained untruthful information. In any event, I credit the description of the reasons for Mr. DeFarias's departure provided by the business's owner (through Lieutenant Williams).

App. Ct. 408, 412 (2000). An offshoot of this overriding goal is the rule that hiring decisions must be made in accordance with “basic merit principles,” i.e., “on the basis of . . . relative ability, knowledge and skills.” G.L. c. 31, § 1.

The civil service examinations are designed to implement this rule. G.L. c. 31, §§ 16-24. When a vacancy is requisitioned, HRD identifies eligible candidates and ranks them “in the order of their marks on the examination,” allowing for certain statutory preferences. *Id.* §§ 25, 26. The appointing authority must then justify any decision to bypass higher-ranked candidates and instead hire lower-ranked ones. *Id.* § 27. *See generally Malloch v. Town of Hanover*, 472 Mass. 783, 787-88 (2015).⁸

On appeal from a bypass decision to the commission, the appointing authority bears the “burden of proving, by a preponderance of the evidence, that there was reasonable justification for [its] action.” *Brckett v. Civil Serv. Comm’n*, 447 Mass. 233, 241 (2006). A reasonable justification means “adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Id.* (quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928)). The commission must evaluate the existence or absence of a reasonable justification based on a de novo hearing and all available, material evidence. *Alband v. Department of Corr.*, No. G1-09-307, at 11-12 (CSC Feb. 10, 2011).

“An appointing authority may use any information it has obtained through an independent, impartial, and reasonably thorough review as the basis of its decision to bypass a

⁸ Mr. DeFarias speculates in his hearing brief that the city may have failed to provide HRD with a prompt statement of the reasons for the bypass decision. *See* G.L. c. 31, § 27. This claim is unsupported by record evidence. And because it was raised only after the hearing, the city’s witnesses had no reason to address it.

candidate.” *Sherman v. Town of Randolph*, 472 Mass. 802, 813 n.18 (2015). Such an investigation may turn up accusations that are sufficiently credible and serious to justify a bypass of an otherwise qualified candidate. *City of Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 189 (2010). On appeal in such cases, the appointing authority must prove the truth of the pertinent accusations by a preponderance of the evidence. *Boston Police Dep’t v. Civil Serv. Comm’n*, 483 Mass. 461, 477-78 (2019) (disapproving of *City of Beverly*, 78 Mass. App. Ct. at 190). See *Melanson v. City of Gloucester*, No. G1-18-198, at 13-14 (CSC Jan. 30, 2020).

The commission’s precedents establish that, to count as “reasonably thorough,” a review process must “provid[e] the applicant with the opportunity to address negative findings . . . particularly if they involve incidents which occurred several years ago.” *DiVenuti v. City of Revere*, No. G1-20-078 (CSC Nov. 19, 2020). The process also must fairly account for all relevant information about each candidate. *Deterra v. New Bedford Police Dep’t*, No. G1-14-195, at 23 n.8 (CSC Oct. 27, 2016). The appointing authority (or the appointing authority’s designee) is therefore required to review both positive and negative aspects of a candidate’s background. *St. Dennis v. City of Worcester*, No. G1-16-69, at 10-11 (CSC Sept. 1, 2016).

The background investigation conducted by Lieutenant Williams and Detective Trefry was independent, impartial, and far from superficial. Still, the city’s review process omitted elements that the commission has deemed indispensable to reasonable thoroughness. Because Mr. DeFarias’s interview took place while the background investigation was ongoing, he received no opportunity to address the detectives’ negative findings. *DiVenuti, supra*. And the investigation report that formed the basis of the bypass decision stated only the detective’s negative findings. As a result, neither Chief Smith nor the mayor reviewed any of the positive

information that the city possessed about Mr. DeFarias. *Deterra, supra*, at 23 n.8; *St. Dennis, supra*, at 10-11.

An appointing authority's failure to conduct a reasonably thorough review does not invariably require reversal of its decision. A decision produced by an inadequate review process may nevertheless be upheld where (a) the appointing authority was motivated by proper, merit-focused considerations; and (b) substantial reasons driving the appointing authority's decision are demonstrated on appeal to be meritorious. *St. Dennis, supra*, at 13; *Sherman, 472 Mass.* at 810-13.

The first of these conditions is easily satisfied here. It is clear that the city and the fire department were not driven by any political considerations, favoritism, or bias. Their goal was to select the most meritorious candidates.

On balance, the second condition is established as well. Otherwise stated, the facts proven at the hearing provide a reasonable justification for the city's decision. *Sherman, 472 Mass.* at 810-13. To be sure, none of the information turned up in the detectives' background investigation spells doom for Mr. DeFarias's professional future. He certainly has not been shown to have acted in any illegal or unethical manner.

On the other hand, the negative reviews of Mr. DeFarias's past employment performance must be taken in context. A consequence of Mr. DeFarias's youth is the brevity of his prior experience. Easily the three most relevant positions he has held are those at Cataldo, Beauport, and Lynnfield. The partly negative reviews provided by those three employers mean that *all* of Mr. DeFarias's most relevant work has failed to wholly impress his supervisors.

Also important are the details of the negative comments that Mr. DeFarias's work has drawn. Two of the three pertinent prior employers identified deficiencies with his clinical

performance: at Beauport, he committed repeated clinical errors; at Lynnfield, he had “trouble catching on.” All three employers reported trouble with Mr. DeFarias’s relationships with his colleagues: at Cataldo, he was defiant upon being suspended; his term at Beauport was touched by personality conflicts; and at Lynnfield he had “a few issues with peers.”

A candidate’s poor clinical record or history of squabbles with peers are good reasons for declining to hire him. Professional references tend to be good evidence that an applicant’s candidacy suffers from such issues. *See Alband, supra*, at 15-16; *Comfrey v. Fall River Police Dep’t*, No. G1-14-81, at 9-10 (CSC June 25, 2015); *Hardnett v. Town of Ludlow*, No. G1-11-239, at 16-17 (CSC July 12, 2012). Indeed, common experience suggests that employers may provide rosy information about most former employees, reserving their negative reports for acute cases. *Cf. Duarte v. Department of Corr.*, No. G1-19-201 (CSC July 1, 2021). Multiple dovetailing reports about a candidate’s poor prior performance and attitude, taken together, may be compelling. And when those reports originate from all of the candidate’s most relevant prior employers, it is natural for a reasonable hirer to be deterred.

Mr. DeFarias shows dedication to his chosen career path. There is no reason to doubt that he will collect more impressive work experience in the near future. Even so, the city’s decision was reasonably justified. At the point in time when the city was hiring, the cons in Mr. DeFarias’s professional history provided an adequate reason to bypass him.

Mr. DeFarias makes an additional argument of a more procedural nature. Before the hearing, he posed repeated discovery requests to the city, focusing on documents that the city had gathered during its hiring process. Testimony at the hearing revealed that Lieutenant Williams and Detective Trefry had compiled a folder of investigation-related documents and

notes. The city’s counsel—apparently unaware of that folder’s existence—neither obtained it from the detectives nor produced a copy to Mr. DeFarias until after the hearing.

Mr. DeFarias’s discontent is warranted. The city’s bypass decision hinged on the information collected by the investigating detectives. It is hard to understand the city’s counsel’s failure to ask the detectives for relevant documents. As a practical matter, it appears that the detectives’ folder would have been available to the city’s counsel upon request. The city’s discovery work was thus unsatisfactory. *See generally* 801 C.M.R. § 1.01(8)(a)-(b).

Nonetheless, any prejudice to Mr. DeFarias has been cured. After the hearing, he received the detectives’ folder and successfully offered it into evidence (as Exhibit A29). A post-hearing order also authorized Mr. DeFarias to file motions “to recall witnesses” and “to summon new witnesses,” which he chose not to do. *See supra* note 4. Reversal of the city’s bypass decision is not a reasonable, proportional response to the circumstances presented.

Conclusion

I recommend to the commission the findings and analysis described *supra*.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate