

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**CHRISTOPHER DUNN,**  
*Appellant*

v.

**Case No.:** G1-13-94

**BOSTON FIRE  
DEPARTMENT,**  
*Respondent*

**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.

The Commission received and reviewed the Tentative Decision of the Magistrate dated September 26, 2013. No written objections were received by either party.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole<sup>1</sup>, thus making this the Final Decision of the Commission.

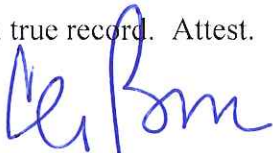
The decision of the Appointing Authority to bypass the Appellant is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on November 14, 2013.

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<sup>1</sup> Footnote 2 of the Magistrate's Tentative Decision addresses the issue of witness testimony. To ensure clarity here, and in other bypass appeals, the Commission does not read the Beverly decision as prohibiting the testimony of an individual who was a percipient witness to the underlying event which resulted in the decision to bypass the Appellant. Here, the Appointing Authority called as its witness the police officer who authored the police report which it relied on when making the bypass decision. The Commission hears evidence and finds facts anew and is not limited to the evidence which was before the Appointing Authority. Nothing in Beverly or any other judicial decision or rule alters the nature of the Commission's de novo proceedings. While the police officer's testimony should have been allowed and given whatever weight the hearing officer deemed appropriate, it does not appear that the outcome here would have been any different. For this reason, we have adopted the findings and conclusion of the Magistrate.

A true record. Attest.



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Christopher C. Bowman  
Chairman

Nither 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.

Notice to:

Joseph G. Donnellan, Esq. (for Appellant)

Robert J. Boyle, Esq. (for Respondent)

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

John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals  
1 Congress Street, 11th Floor  
Boston, MA 02114  
[www.mass.gov/dala](http://www.mass.gov/dala)

**Chris Dunn, Jr.,**  
Appellant

v.

Docket No. G1-13-94  
CS-13-341

**Boston Fire Department,**  
Appointing Authority

**Appearance for Appellant:**

Joseph G. Donnellan, Esq.  
Rogal & Donnellan  
100 River Ridge Drive  
Suite 203  
Norwood MA 02062

**Appearance for Appointing Authority:**

Robert J. Boyle, Jr., Esq.  
Labor Counsel  
City of Boston Office of Labor Relations  
Boston City Hall, Room 624  
Boston, MA 02201

**Administrative Magistrate:**

**Kenneth Bresler**

**SUMMARY OF RECOMMENDED DECISION**

The City of Boston had reasonable justification to bypass the Appellant for the position of firefighter. I therefore recommend that the Civil Service Commission dismiss the appeal.

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## RECOMMENDED DECISION

Under G.L. c. 31, § 2(b), the Appellant, Chris Dunn, Jr., appeals the Boston Fire Department's bypass of him for the position of firefighter. The Civil Service Commission held a prehearing conference on May 7, 2013. It denied the Appointing Authority's motion to dismiss. I held a hearing on June 24, 2013. The hearing was digitally recorded.<sup>1</sup> The Appointing Authority called one witness, Robert Moran, its Human Resources Director.<sup>2</sup> The appellant testified and called no other witness.

I admitted 11 exhibits into evidence at the hearing.<sup>3</sup> I left the record open for the Appointing Authority to provide the appellant with a document, with the understanding that the

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<sup>1</sup> Before the appellant testified, his lawyer asked for a break. I granted it and paused the recording, as I do to make listening to recordings easier for any subsequent listeners. When the hearing resumed, I neglected to turn the recording back on until the appellant was testifying on direct examination. If any party was prejudiced or inconvenienced by my negligent error, it has not so stated. Ultimately, my decision does not depend on anything that Mr. Dunn testified to, whether recorded or not.

<sup>2</sup> The Appointing Authority spent a good deal of time at the hearing arguing that the officer who arrested the appellant should testify. It continues this argument in its brief. (Boston Fire Dept. Br. 2, 3, 8-9.) The Appointing Authority was unable to articulate what the testimony of the officer could add to his own arrest report. (In fact, having the officer testify could have entailed an admission that his arrest report was incomplete, certainly not something that the Appointing Authority desired.) Contrary to the Appointing Authority's argument (Boston Fire Dept. Br. 8-9), under *Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 187 (2010), I was not required to have allowed the Appointing Authority to call the officer. See G.L. c. 30A, § 11(2) (presiding officer has discretion to exclude unduly repetitious evidence); § 11(5) (presiding officer has duty to exclude evidence that was not the basis of the Appointing Authority's decision); and 801 CMR 1.01(d)2 (presiding officer has duty to decide evidentiary and procedural issues).

<sup>3</sup> Despite the Appointing Authority's efforts at the hearing to have exhibits admitted for all purposes, and despite its imprecise statements in its brief (Boston Fire Dept. Br. 3, 4), I did not admit exhibits for all purposes. I admitted exhibits, as I said at the hearing, for reasons of efficiency, with their use to be argued or determined later. If the Boston Fire Department means to argue that I have admitted exhibits for all purposes, including for purposes it did not state and that I could not foresee, that is not so. And as I stated at the hearing, my admitting exhibits did not entail a decision on how much weight I must give them.

appellant could introduce it as an exhibit. Rather than receive a post-hearing exhibit, I received a stipulation from the parties dated June 25, 2103. On my own initiative, I admit it as Exhibit 12.

### **Findings of Fact**

1. On April 27, 2010, an usher at the sports arena TD Garden in Boston asked Christopher Dunn to leave a Boston Celtics game. (Ex. 1.)

2. Mr. Dunn was intoxicated. (Exs. 1, 4.)

3. Mr. Dunn was leaving with a friend, was shouting obscenities, and was followed by the usher when he noticed Boston Police Officer Frank Nogueira, who was there on a paid detail. (Exs. 1, 4.)

4. Mr. Dunn directed obscenities at the officer and shouted, "What the hell are you going to do? I'm a marine." (Ex. 1.)

5. The officer, who did not have any fellow officers to assist him, followed Mr. Dunn and his friend as they went down some stairs. (Ex. 1.)

6. Mr. Dunn ran at the officer aggressively and threateningly, using obscenities, and shouting, "I just got out of the marines for three years." Mr. Dunn's friend restrained him before he could reach the officer, and tried to calm him. (Ex. 1.)

7. Security personnel from TD Garden arrived and began to lead Mr. Dunn on his way out of the Garden. (Ex. 1.)

8. Mr. Dunn grabbed at Officer Nogueira and punched at various people. (Ex. 1.)

9. Various people brought Mr. Dunn to the ground, but he put his left hand under himself, precluding him from being handcuffed. (Ex. 1.)

10. When two additional Boston police officers arrived, they handcuffed Mr. Dunn. (Ex. 1.)

11. The Boston police arrested Mr. Dunn for disturbing a public assembly, assault and battery on a police officer, and resisting arrest. (Exs. 1, 2.)

12. Mr. Dunn continued to scream obscenities as he was led from TD Garden. (Ex. 1.)

13. In court, Mr. Dunn admitted to sufficient facts on all three charges and received a continuation without a finding (CWOFF). (Exs. 5, 6, 7.)<sup>4</sup>

14. As part of the disposition of the criminal case against him, Mr. Dunn was required to apologize to the officer, which he did more than once. (Exs. 3, 4.)

15. Mr. Dunn paid various fees and costs, and on or about October 12, 2011, all charges were dismissed. (Ex. 2.)

16. In 2010, Mr. Dunn took a Civil Service examination. He received a score of 95; received credit for being a disabled veteran; and tied for seventh place among applicants. Fifty-three applicants were selected. (Prehearing conference stipulation.)

17. On August 17, 2012, Mr. Dunn filled out an application to be a firefighter with the Boston Fire Department. (Ex. 9.)

18. The Boston Fire Department knew that Mr. Dunn had a CWOFF on his criminal record because, for one reason, he reported his CWOFF in his application. (Ex. 9.)

19. When Mr. Dunn applied to the Boston Fire Department, its policy was not to hire an applicant for a firefighter position who had received a CWOFF in the previous five years. Before 2010, the department's policy was stricter: not to hire an applicant for a firefighter position who had ever received a CWOFF. (Moran testimony.)

20. The selection process for firefighters included a roundtable discussion by various members of the Boston Fire Department. The roundtable considered the police report about Mr.

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<sup>4</sup> The date on which Mr. Dunn admitted to sufficient facts does not appear on his criminal record because of a poor photocopy. (Ex. 5.)

Dunn's arrest. (Moran testimony; Ex. 5.) (The text of the police report that appears in Exhibit 5 is the same as the text of Exhibit 1. The format differs between the two exhibits. The roundtable had the police report that appears in Exhibit 5.)

21. On February 5, 2013, the Boston Fire Department informed the Human Resources Division of the Executive Office for Administration and Finance that it was bypassing Mr. Dunn for a firefighter position. (Ex. 6.)

22. On March 6, 2013, the Boston Fire Department informed Mr. Dunn that it was bypassing him. (Ex. 7.)

23. Both the February 5 and March 6, 2013 letters noted that Mr. Dunn had admitted to sufficient facts to the three criminal charges, which it named, and had received a CWO. Fire Commissioner Roderick J. Fraser, Jr. opined that selecting Mr. Dunn would not be in Boston's best interest, because "his behavior conflicts with [the]...goals of a public safety department and lowers the trust...that the community places in the City" of Boston. Commissioner Fraser continued that a firefighter "must be honest, trustworthy and dependable"; a firefighter having those traits is "crucial" and cannot be the subject of compromise. He further stated that Mr. Dunn "has demonstrated anti-social behavior...and disregard for the law" and would therefore be "unable to conform" to the Boston Fire Department's rules and regulations. He noted that a firefighter, in addition to fighting fires, may issue citations and initiate criminal cases related to fire and public safety. He implied that a firefighter with a criminal record would be unable to maintain the trust of the public while performing all of his duties. (Exs. 6, 7.)

24. On April 3, 2013, Mr. Dunn timely appealed his bypass. (Ex. 8.)

## Discussion

I conclude that

the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.

*Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303 (1997)(footnote and citations omitted). The decision to bypass was not “arbitrary and capricious.” *Id.*

The Boston Fire Department was reasonably justified and not arbitrary or capricious in bypassing Mr. Dunn for two reasons: Mr. Dunn’s CWOFF; and Mr. Dunn’s actions that led to the CWOFF. *See Campbell v. Boston Fire Dept.*, CSC No. G1-08-46, DALA No. CS-08-419, 22 MCSR 489; *Acosto v. Dept. of Correction*, CSC No. G1-10-90, 23 MCSR 605.

One of the criminal charges against Mr. Dunn was assault and battery *on a police officer*. It was not simply assault and battery. Another charge was resisting arrest. Both charges demonstrate Mr. Dunn’s active interference with and disregard for the authority of public safety officers *in Boston*. Another public safety agency *in Boston*, the Boston Fire Department, therefore was reasonably justified in bypassing him. Mr. Dunn, in his post-hearing brief, does not address head-on this reasonable justification.

As for the Boston Fire Department’s second justification for bypassing Mr. Dunn, its policy of not hiring applicants whose criminal cases had been disposed with CWOFFs in the previous five years was reasonable. The policy’s purpose is to try to ensure the maturity and responsibility of public servants and public safety officers who must maintain the public’s trust. In *Buckley v. Boston Police Dept.*, CSC No. G1-12-110, DALA No. CS-12-624, the Boston Police Department, which had a policy of not hiring applicants who had received a CWOFF for drunk driving in the previous 10 years, was reasonably justified in bypassing an applicant who had received such a CWOFF nine years



before. The Appointing Authority's policy in this appeal was a "neutrally applied public policy." *Cambridge*, 43 Mass. App. Ct. at 304.

Mr. Dunn presents alternative arguments against this second reasonable justification. He questions whether this policy actually exists because, for one thing, he asserts that Mr. Moran did not testify about it in two other cases, *Walsh v. Boston Fire Dept.*, G1-12-4, and *Campbell*. (Dunn Br. 11.)

It is unclear how Mr. Dunn can make this argument, because Paragraph 44 of the *Walsh* decision reads:

The Department has bypassed individuals who have closed criminal cases and cases continued without a finding. (Moran Test., p. 60).

In his brief, Mr. Dunn cites Paragraphs 45 and 46 of the *Walsh* decision, which he attached to his brief, but not Paragraph 44. (Dunn. Br. 6, 8, 11, 12.) Moreover, Mr. Dunn's summary of Mr. Moran's testimony as recounted in Paragraphs 45 and 46 is imprecise (Dunn Br. 4, 8, 11, 12), and therefore too thin a reed to support his argument.

As for *Campbell*, it did not involve a continuation without a finding. The fact that this decision does not mention that Mr. Moran testified about this policy does not mean that the policy did not exist.

I have no reason to accept Mr. Dunn's assertion, "It appears that the testimony regarding a five year look back is a revision of Mr. [Moran]'s earlier Civil Service testimony" in the *Walsh* case. (Dunn. Br. 11.) I have no reason to accept Mr. Dunn's request that "Mr. Moran's testimony regarding a five year look back be disregarded as not credible." (Dunn Br. 11.) It is hard to invoke the *Walsh* decision as a reason to question Mr. Moran's credibility when the Civil Service Commission concluded that

“Mr. Moran testified credibly when confirming certain reasons for the Department’s bypass of the Appellant.” *Walsh*.

Mr. Dunn argues that the absence from the evidence of a written document memorializing the hiring policy regarding CWOs indicates the absence of such a policy. (Dunn Br. 11.) Mr. Dunn’s lawyer had the opportunity to cross-examine Mr. Moran, used that opportunity, and chose not to question him about whether the policy is in writing. Mr. Dunn had a chance to engage in discovery, 801 CMR 1.01(8) and apparently chose not to request such a document. Mr. Dunn is not well positioned to argue the implications of the absence of such a document from the evidence.

Mr. Moran’s testimony established the existence of a hiring policy regarding CWOs. It does not need to be in writing to be a policy.

Mr. Dunn argues in the alternative that the Boston Fire Department’s policy of not hiring applicants with CWOs on their records is arbitrary and capricious, because a CWO is a dismissal. (Dunn Br. 7.) The fact that Mr. Moran did not know that the criminal law considers a CWO to be a dismissal (Moran testimony; Dunn Br. 7) is not significant.

Under the criminal law, CWOs are dismissals, G.L. c. 278, § 18, but all dismissals are not CWOs. All dismissals are not equal. The Boston Police Department, in the context of civil service law, is not required to accept the criminal law’s view of CWOs as dismissals and treat all dismissals as equally serious or not serious.

The Boston Fire Department need not treat Mr. Dunn, an applicant to be a firefighter who in effect pleaded guilty for attacking a police officer and, apparently because of his contrition and military service, received a disposition that in effect is a dismissal, the same as a

hypothetical applicant whose case was dismissed because he was incorrectly charged with a crime he did not commit.

Mr. Dunn's argument that a CWOFF is a dismissal does not ultimately help him. In *Campbell*, one reason that an applicant to the Boston Fire Department was bypassed is because of his criminal history, including dismissals. Even if Mr. Dunn is correct that the Boston Fire Department should consider a CWOFF the same as other dismissals of criminal charges, the Department was reasonably justified in bypassing Mr. Dunn for having a dismissal on his criminal record.

Mr. Dunn argues that he is

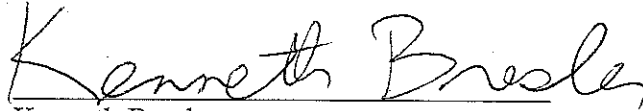
entitled to have the BFD look at the whole picture of his life and to place his singular arrest in the context of a life well led.

(Dunn Br. 12.) The Boston Fire Department was entitled to view Mr. Dunn's one arrest and decide that it had better applicants to be firefighters. *Town Of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004) ("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....") (citations and internal quotation marks omitted).

### Conclusion and Order

The Appointing Authority had two reasonable justifications to bypass the appellant. I recommend that his appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script that reads "Kenneth Bresler". The signature is written in dark ink and is positioned above the printed name and title.

Kenneth Bresler  
Administrative Magistrate

Dated: **SEP 26 2013**