

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503
Boston, MA 02108
617-979-1900

JOSEPH FOOTE,
Appellant

G1-21-207

v.

CITY OF BROCKTON,
Respondent

Appearance for Appellant:

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

Appearance for Respondent:

Gregory S. Mathieu, Esq.
Assistant City Solicitor
City of Brockton Law Department
43 School Street
Brockton, MA 02301

Commissioner:

Paul M. Stein

Summary of Decision

The Commission allowed the bypass appeal of a military veteran seeking appointment as a firefighter with the Brockton Fire Department based on the appointing authority's erroneous conclusions that the Appellant did not qualify for residency preference and had been less than truthful regarding his claim to residency in Brockton.

DECISION

On November 2, 2021, the Appellant, Joseph Foote (Appellant), acting pursuant to G. L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the Mayor of the City of Brockton (Brockton) to bypass him for appointment as a full-time permanent

Firefighter for the Brockton Fire Department (BFD).¹ A pre-hearing conference was held via videoconference (Webex) on December 7, 2021. Further remote status conferences (via Webex) on January 11, 2022 and May 10, 2022 failed to produce a resolution of the dispute. A full hearing was held at the UMass School of Law at Dartmouth on September 23, 2022, which was digitally recorded.² Each party filed Proposed Decisions on December 9, 2022. For the reasons set forth below, Mr. Foote's appeal is allowed.

FINDINGS OF FACT

Twenty-one (21) exhibits have been introduced into evidence (*App. Exhs. 1 through 12 & App. PH Exh.13 (tax returns) and App. PH Exh.14 (military records); Resp. Exhs. 1 through 7*). Based on the documents submitted and the testimony of the following witnesses:

Called by Brockton

- Brian Nardelli, BFD Fire Chief
- Jeffrey Marchetti, BFD Deputy Fire Chief
- David Owen, BFD Lieutenant

Called by the Appellant:

- Joseph Foote, Appellant
- Steven Foote, Appellant's father

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 (Formal Rules), apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² A link to the audio / video recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

1. The Appellant, Joseph Foote, was born and raised in southeastern Massachusetts. He currently resides in New Bedford, MA. (*Resp.Exh.2; Testimony of Appellant*)

2. The Appellant graduated from high school in 2012 and, shortly thereafter, enlisted in the United States Air Force Reserves, where he was trained as a member of the USAF's security services. He is assigned to a Security Forces Squadron located at Westover AFB, Chicopee, MA. He holds top secret clearance and currently holds the rank of Technical Sergeant (E-6).³ He earned an Associate's Degree during his military service. (*Resp.Exh.2; App.PHExh.14; Testimony of Appellant*)

3. In 2019, the Appellant lived with his family in Halifax, MA. He spoke with his father, a career BFD firefighter, about his interest in becoming a BFD firefighter. They discussed how he would need to move to Brockton for a year prior to the firefighters' civil service examination, so that he could claim preference as a resident and earn a higher place on the eligible list. (*Resp.Exh.1 [R0023]; Testimony of Appellant & S. Foote*)⁴

4. The Appellant looked into moving to an apartment in Brockton, but could not find a rental he could afford on his income at the time. (*App.PHExh.13; Testimony of Appellant*)⁵

5. Following this conversation, the Appellant and his father met with the father's lifelong friend who owned a home on Atlanta Street in Brockton (the Atlanta Street property) and had a

³ The rank of USAF Technical Sergeant is a mid-level Non-Commissioned Officer (NCO) leadership position, just below the top (E-7) NCO rank of USAF Master Sergeant. (*Administrative Notice [https://www.defense.gov/Resources/Insignia/]*)

⁴ The Appellant was not aware that his military status would provide him an alternative opportunity to claim a Brockton residency preference without meeting the one-year requirement. (*Testimony of Appellant; Administrative Notice [https://www.mass.gov/service-details/residency-preference-for-civil-service-police-and-fire-jobs]*)

⁵ The Appellant reported less than \$17,000 in earned income for 2019. (*App.PHExh.13*)

vacant furnished room available after his own children had moved out, which he offered to the Appellant for \$200/month. (*Resp.Exh.7 [R0090-R0091]; Testimony of Appellant & S. Foote*)

6. Atlanta Street is a dead-end street several hundred feet long, accessed from Sawtell Street. The Atlanta Street property is the largest lot on the street, bounded by Atlanta Street to the south, Fiske Street to the west and North Avenue to the north. The principal means of ingress/egress by vehicle is by a circular driveway off North Avenue. The home is sited perpendicular to Atlanta Street and the lot is secluded from the neighbors by a fence, trees and hedges. There is one smaller home to the right side (east) of the Atlanta Street property and four smaller homes across the street. (*App.Exhs.11 &12; Testimony of Appellant, S. Foote & Owen*)

7. On March 20, 2019, the Appellant moved his personal belongings from the Halifax home to the room at Atlanta Street, Brockton.⁶ He used the North Avenue driveway as his sole means of access and parked his car in that driveway. (*Testimony of the Appellant & S. Foote*)

8. Effective March 20, 2019, the Appellant changed his automobile registration to list the Atlanta Street address. His current registration, renewed in September 2020, also shows the Atlanta Street address, as does a Certificate of Title issued on August 10, 2021. (*App.Exhs.1,2 & 10*)

9. The Appellant's automobile insurance policy was renewed, effective April 1, 2019 and April 1, 2020, at the Atlanta Street address. (*App.Exh.6*)⁷

10. The Appellant paid excise taxes to Brockton for 2020 and 2021. (*App.Exhs.3,4, 8 & 9*)

⁶ The Appellant holds a License to Carry a Firearm (LTC) issued by the Halifax Police Department in June 2018. He did not bring his firearm to Brockton but left it in Halifax at the request of the Atlanta Street homeowner. (*Testimony of Appellant*).

⁷ The Appellant paid over \$2900 annually to insure his car in 2019 & 2020. (*App.Exh.6*) Brockton is ranked as the most expensive city in which to insure an automobile in Massachusetts. (*Administrative Notice [Average Car Insurance Cost in Massachusetts | Insure.com]*)

11. The Appellant's income tax returns listed the Atlanta Street property as his home address. (*App.Exhs. 5 & 13*)

12. The Appellant considers his Air Force Reserve service as his primary occupation. He was activated, sometimes for weeks at a time, on various domestic and overseas assignments during April through August 2019. In October and November, he spent many days at Westover AFB and Hanscom AFB in preparation for an impending deployment to Afghanistan. In December 2019, he spent most of the month with friends on a trip to Florida and with his family until he was deployed at the end of December for seven months in Afghanistan, returning in July 2020. Upon his return, he spent time with family and friends to "decompress", essentially "living out of a suitcase". He was again activated for duty for three months in 2020 (October to December 2020) and five months in 2021 (May to September). (*App.PHExh.14; Testimony of Appellant*)⁸

13. When he was on military orders assigned to Westover AFB, the Appellant stayed at a hotel on the base. (*Testimony of Appellant*)

14. During 2019 and 2020, the Appellant was in a dating relationship with a girlfriend who had a family home in Plymouth and who worked seasonally (May through October) on Martha's Vineyard. He would visit her during the summer and stay at her apartment on the island. He did not "move in" or live with her at any time. (*Testimony of Appellant*)⁹

⁸ A DD214 issued to the Appellant in April 2017 makes reference to Brockton, MA as his "Home of Record", and also to the family home in Halifax as the "Mailing Address After Separation". Other military orders issued from 2018 to 2021 list the Appellant's "Present Street Address" as being in Halifax. (*App.PHExh.14*)

⁹At the Commission hearing, the Respondent produced notes prepared by Dep. Chief Marchetti that indicated the girlfriend told him she and the Appellant "lived together" sometime in the 2018-2019 timeframe. (*Resp.Exh.7; Testimony of Marchetti*) No evidence was introduced to corroborate that statement. I infer she was referring to the time they spent together on Martha's Vineyard during the summers.

15. In response to questions on cross-examination, the Appellant estimated that he stayed at the Atlanta Street property for about 21 days through May 2019, sporadically during the summer (when he was not on military orders or visiting his girlfriend), and most of the month of September 2019. (*Testimony of Appellant*)

16. From July 2019 through November 2020, the Appellant also worked for a private federal government subcontractor as a background investigator. The job required top secret clearance, and the Appellant conducted background checks on federal employees and contractors. In July 2019, the private company sent him to Virginia where he attended background investigator's school for several weeks. (*Resp.Exh.1; Testimony of Appellant*)

17. Prior to July 2021, the Appellant's income increased substantially, enabling him to rent an apartment on Madrid Square in Brockton. He moved there on or about July 1, 2021, paying a monthly rent of \$1550. After moving to Madrid Square, the Appellant retrieved his firearm from his former home in Halifax where he had kept it. (*Resp.Exhs.2, 3 & 7; Testimony of Appellant*)

18. On November 19, 2020, the Appellant took and passed the entry-level firefighter's civil service examination (originally scheduled for March 21, 2020 but delayed due to the COVID-19 State of Emergency) that was administered by the Massachusetts Human Resources Division (HRD). His name appeared on the firefighter's eligible list established by HRD on February 1, 2021, as a Brockton resident. (*Stipulated Facts; Administrative Notice [HRD email to the Commission dated 12/6/2021]; Testimony of Appellant*)

19. On June 8, 2021, HRD issued Certification #07860 to Brockton for appointment of 12 vacancies in the position of BFD firefighter. The Appellant's name appeared in 11th place, tied with three other veterans claiming Brockton residency. (*Resp.Exh.1; Stipulated Facts; Administrative Notice [HRD email to the Commission dated 12/6/2021]*)

20. On June 30, 2021, the Appellant submitted the required BFD Employment Application Package. (*Resp.Exh.2*)

21. BFD Fire Lieutenant David Owen was assigned to conduct a background investigation of the Appellant. (*Resp.Exh. 7; Testimony of Owen & Marchetti*)

22. As part of his background investigation, Lt. Owen made inquiry in to whether the Appellant lived during the period March 21, 2019 through March 21, 2020, as that was the period he understood the Appellant needed to have lived in Brockton in order to claim a residency preference.¹⁰

23. On August 5, 2021, Lt. Owen spoke by telephone with the owner of the Atlanta Street property. His notes of this telephone interview state:

- “Dates of applicant’s residency at address: 3 years ago off and on”
- “[My] kids moved out. Foote moved into kid’s empty room. Comes and goes in between military orders. Says he still has a room there. . . . is not there very often but when he is he keeps to himself watches TV in his room but is very clean [and] always picks up his mess and cleans up kitchen after use.”
- If there were a fire or medical emergency at your house he was confident in the applicant’s ability to respond as a firefighter – ““I think he would be a great firefighter” “ . . . he would probably throw me over his shoulder and carry me out.”

(*Resp.Exh.7; Testimony of Owen*)

24. The following day, August 6, 2021, at about 4 pm, Lt. Owen drove to Atlanta Street (via Sawtell Street) where he spent about 20 minutes in the neighborhood. He spoke to three residents on Atlantic Street. His notes indicate: a resident at 22 Atlanta told him he “has never seen [the Appellant] or seen his [car]”; and a resident at 19 Atlanta said she lived on the street “forever” and was “very adamant that [the Appellant] never lived there.” The interview notes indicate that he

¹⁰ The full extent of Lt. Owen’s background investigation is not clear. The only (handwritten) notes he produced at the Commission hearing during cross-examination pertain to the residency issue, the sole basis for the decision to bypass the Appellant. (*Resp.Exhs.4 &7*)

also spoke to a “teenager and mother at 3 Atlanta” but the complete notes were cut off and the substance of that interview is not included. (*Resp.Exh.7; Testimony of Owen*)

25. Lt. Owen did not know that the residents of the Atlanta Street property used the driveway on North Avenue, hidden from the homes on Atlanta Street, to access the property and parked their cars there. He did not canvass anyone on North Avenue. (*Testimony of Owen*)

26. Lt. Owen did not conduct a home visit of the Atlanta Street property or visit Madrid Square because he was only focused on establishing where the Appellant lived from March 2019 to March 2020. Nor did he reach out to the Appellant’s father because it was believed that to do so would be to unfairly advantage the Appellant over other candidates who did not have a relative working for the BFD. (*Testimony of Owen & S. Foote*)

27. Lt. Owen also contacted a resident who lived in the Halifax neighborhood where the Appellant had lived with his father. That person had only seen the Appellant a few times in recent years. He said the Appellant was a “top notch kid, I’m surprised he is not on the [Fire Department] already”. (*Resp.Exh.7*)

28. Lt. Owen summarized his conclusion about the Appellant’s residency in a handwritten note which stated:

“Unable to confirm any address. Most likely stays on base when on orders and then bounced from one house to another. He may have a friend nearby or girlfriend, his references say different things. All Military Records list Halifax as does credit report and LTC. D[river’s] L[icense], Tax Returns and [auto] Reg[istration] list Atlanta St.”

Lt. Owen also noted: “3/20/19 is 1 day prior to residency requirement.” (*Resp.Exh.7*)

29. On August 26, 2021, the Appellant appeared before a five-member interview panel, consisting of BFD Fire Chief Nardelli, Dep. Chief Marchetti, Dist. Chief DePasquale, Capt. McKenna and Lt. Owen. The interviews were not recorded or scored, and the candidates’ performances were not ranked. The candidates were all asked a set number of questions as well

as some questions specific to issues about a particular candidate. Each panelist kept detailed notes. (*Resp.Exh.3: Testimony of Marchetti & Owen*)

30. The interview panel asked the Appellant about his claim to Brockton residency. He explained that he moved from Halifax to the Atlantic Avenue property in March 2019 so that he would be assured a residency preference in Brockton, which was his preferred employment locale. He said he paid \$200 rent in cash each month. He stated that he moved to Madrid Square in July 2021 and pays \$1550 per month for that apartment. He said he “stayed a few nights in the city per month”, and also stayed for unspecified periods of time “on base” as well as in Fairhaven, Plymouth and Halifax. (*Resp.Exh.7; Testimony of Appellant, Marchetti & Owen*)

31. When asked why his military orders showed a Halifax address, the Appellant explained that he continued to use his father’s Halifax address for military purposes because his father was “his most trusted confidant” and he wanted his military records (and other important documents) to be mailed there, especially when he was deployed. (*Resp.Exh.7: Testimony of Appellant*)

32. The interview panel initially reached different conclusions about the Appellant’s residency explanation. Chief Nardelli’s notes stated he was “not sure”. Dep. Chief Marchetti thought the Appellant was “somewhat questionable on residency.” Dist. Chief DePasquale wrote the Appellant was “evasive with residency questions.” Capt. McKenna wrote the Appellant “seemed honest” as did Lt. Owen. (*Resp.Exh.7; Testimony of Marchetti & Owen*)

33. By letter dated September 1, 2021, Brockton Mayor Robert F. Sullivan informed the Appellant that he was “bypassed” because “[y]ou do not meet the requirements to claim residency

preference in the City of Brockton, which would have required you to establish residency in the city the entire year prior to the exam date (3/21/2019 – 3/21/2020).” (*Resp.Exh.4*)¹¹

34. The Mayor’s letter cited various factors that were taken into account: (a) his claim to have moved to Brockton precisely on the day before the residency period began; (b) no Brockton neighborhood references listed on application; (c) no neighbors on Atlanta Street who knew him and multiple neighbors stated he did not live there; (d) he stated at the interview that he stayed at the Atlanta Street property only “a few nights per month”; (e) a former girlfriend said he lived with her in Plymouth in 2018-2019 but he did not list Plymouth as a place of residence on his application; and (f) his current USAF active duty orders list Halifax as his residence. (*Resp.Exh.4*)

35. Brockton appointed six other candidates, all Brockton residents, ranked below the Appellant on the certification. (*Stipulated Facts; Resp.Exh.1*)

36. This appeal duly ensued. (*Resp.Exh.5*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Service Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

¹¹ Technically, if the Appellant were not entitled to residency preference, his name should have been placed on the certification below all qualified Brockton residents. Since no non-residents were reached for consideration, the Appellant’s non-selection would not be a “bypass” because only residents, all of whom would be ranked higher than all non-residents, were appointed.

Original appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the

Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); Police Comm’r v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

An Appointing Authority is well within its rights to bypass an individual for fudging the truth as part of an application for a civil service position. It is reasonable to infer that a person who does so in order to get a job will be inclined to lie on the job. See O’Brien v. Somerville, 25 MCSR 292 (2012). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Polin v. Randolph, 23 MCSR 229 (2011).

However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. “[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety.” Kerr v. Boston Police Dep’t, 31 MCSR 35 (2018),

citing Morley v. Boston Police Department, 29 MCSR 456 (2016). Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. See G.L. c. 31, § 27, ¶ 2. Thus, the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness require that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016); Morley v. Boston Police Dep't, 29 MCSR 456 (2016); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake about appellant's characterization of past medical history).

ANALYSIS

Based on a longstanding HRD policy, candidates on active military duty during the statutory one-year residency preference window may qualify for residency preference in a city or town in Massachusetts if they begin residing in that community within ninety days of their discharge from their active military duty. See RESIDENCY PREFERENCE FOR CIVIL SERVICE POLICE AND FIRE JOBS, <https://www.mass.gov/service-details/residency-preference-for-civil-service-police-and-fire-jobs>. Here, the preponderance of the evidence establishes that the Appellant began residing in Brockton within 90 days of being discharged from active military duty, thus qualifying him for civil service residency preference in Brockton. For this reason, the City's decision to bypass the Appellant for now meeting the residency preference requirement must be overturned.

It is undisputed that the Appellant was deployed to Afghanistan from December 2019 until July 2020. For reasons explained more fully below, I find the Appellant's testimony credible that, upon return from Afghanistan, and after spending time with friends and family, he began residing at the Atlanta Street property for substantially all of September 2020 and thereafter until he was,

again, deployed in October 2020. On those facts, the Appellant qualified to claim residency preference in Brockton under HRD's military residency proviso.

Much of this appeals rests on the credible testimony of the Appellant. He is a calm, well-spoken individual. His responses to questions were credible and responsive, displaying a clear and consistent recollection of events. He credibly explained how he began residing in Brockton, moving from Halifax to Atlanta Street in Brockton in March 2019. Other indicia bolster his credible testimony, including registering his car in Brockton, and insuring it as being garaged in Brockton, paying excise tax to Brockton and filing his tax returns as a Brockton resident. I find his testimony credible that he moved his personal belongings to the Atlanta Street property, and, although he spent a significant amount of time away on military duty and with friends and family, he resided at the Atlantic Street property in Brockton.

I have taken account of the facts that the Respondent asserts to rebut the conclusion that the Appellant began residing in Brockton within the ninety-day window. I find, however, that these facts do not outweigh the Appellant's credible testimony and the other corroborating evidence described above that establish that he began residing in Brockton within the applicable timeframe. I give little weight to the fact that the Appellant did not list any references on Atlanta Street and the three Brockton residents interviewed by Lt. Owen did not know him. Although the official address is Atlanta Street, the property is actually oriented toward North Avenue and is surrounded by a fence, hedges and trees. As the photographic evidence introduced at the Commission hearing showed, Atlanta Street residents would not be likely to see the Appellant coming and going or see his car parked in the driveway on the North Avenue side of the house. The Appellant testified, the notes of Lt. Owen's telephone interview with the owner of the Atlanta Street property confirm, that he mainly kept to himself, which further explains why he did not know the neighbors on

Atlanta Street or list them as references. Lt. Owen's notes of his interview of the person in Halifax, if they established anything, showed that he was rarely in Halifax in recent years.

The Appellant candidly acknowledged that he spent a significant amount of his time away from the Atlanta Street property. It is not disputed that his military duties took him away for weeks, and, on at least two occasions, for months at a time. I also accept the Appellant's explanation that he continued to use his father's address in Halifax as the contact address for military purposes during those absences. His subsequent deployments, however, do not negate his credible testimony that he moved to Atlanta Street and established residency in Brockton prior to those absences.

I do not credit the hearsay evidence based on Dep. Chief Marchetti's notes of a conversation with the Appellant's former girlfriend, purporting to suggest that he resided with her during some part of 2018 and 2019. I find it more plausible that, as the Appellant testified, he visited his girlfriend during the summer when she worked on Martha's Vineyard and at her parents' home in Plymouth, but he never resided at her address.

The fact that the Appellant paid his rent to the owner of the Atlanta Street property in cash and received no written receipts, is not strictly probative that he did not actually reside at Atlanta Street. Without any evidence to discredit the Appellant's testimony, and my overall conclusion that the Appellant testified truthfully, I accept the Appellant's uncontroverted testimony about the rental arrangement.¹²

Finally, I considered relevant evidence that Brockton overlooked or chose to ignore. The background investigator spent about 20 minutes on Atlanta Street, talked to neighbors on adjacent

¹² In the future, applicants who enter into rental agreements specifically designed to meet residency requirements (especially when they involve a private rooming arrangement) will be expected to take care to minimize the risk that an appointing authority (or the Commission) will find the arrangement to be a subterfuge, by assuring that they receive and retain documentary proof of the date and amounts of all rental payments.

properties, but did not visit the Atlanta Street property where the Appellant resided. He did not realize that the Atlanta Street property was more closely associated with North Avenue. Neither the background investigator nor the interview panel followed up with the Appellant about the information received from the Atlanta Street neighbors or the former girlfriend.

In sum, the preponderance of the evidence establishes that the Appellant began residing at the Atlanta Street property in March 2019. Accordingly, he was improperly bypassed by the Respondent and deserves another opportunity to be considered for appointment as a BFD firefighter.

CONCLUSION

For all of the above stated reasons, the appeal of Joseph Foote, under Docket No. G1-21-207 allowed. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that HRD and/or Brockton, in its delegated capacity, shall:

- A. Place the name of the Appellant, Joseph Foote at the top of any current or future Certification for original appointment to the position of Brockton firefighter until he is appointed or bypassed after further consideration consistent with this Decision.
- B. If Mr. Foote is appointed as a Brockton firefighter, he shall receive, retroactively, the same civil service seniority date as the first candidate ranked below Mr. Foote who was appointed from Certification No. 07860. This retroactive civil service seniority date is not intended to provide Mr. Foote with any additional pay or benefits including, without limitation, creditable service toward retirement.
- C. Once the Appellant has been provided with the relief ordered above, Brockton shall notify the Commission, with a copy to the Appellant, that said relief has been provided. After verifying that the relief has been provided, the Commission will notify HRD that the Appellant's name should no longer appear at the top of future certifications

Civil Service Commission

s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein & Tivnan, Commissioners) on March 9, 2023.

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:

Joseph G. Donnellan, Esq. (for Appellant)
Gregory S. Mathieu, Esq. (for Respondent)
Michele Heffernan, Esq. (HRD)
Regina Caggiano (HRD)