

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Decision mailed: 12/31/10
Civil Service Commission *JS*

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

LARRY FRANKLIN,
Appellant

v.

CITY OF LEOMINSTER,
Respondent

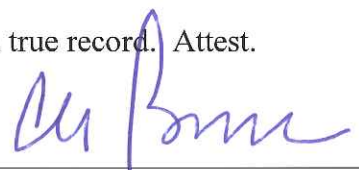
Case No.: G1-10-136

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on December 30, 2010 to acknowledge receipt of the report of the Administrative Law Magistrate dated November 1, 2010. Neither party submitted comments to the Commission. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on December 30, 2010.

A true record. Attest.

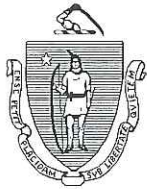


Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Larry Franklin (*pro se*)
Brian Maser, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
FAX: 617-727-7248

November 1, 2010

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

Re: Larry Franklin v. City of Leominster
DALA Docket No. CS-10-758
CSC Docket No. G1-10-136

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Dear Chairman Bowman:

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

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Larry Franklin
Brian Maser, Esq.

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals


Larry Franklin,
Appellant

v.

Docket No. G1-10-136/CS-10-758

City of Leominster,
Respondent

Appearance for Appellant:

Larry Franklin


Appearance for Respondent:

Brian Maser, Esq.
Kopelman and Paige, P.C.
101 Arch St.
Boston, MA 02110

Administrative Magistrate:

Kenneth J. Forton, Esq.

SUMMARY OF RECOMMENDED DECISION

The appointing authority's decision to bypass the Appellant for a firefighter position was reasonably justified, based on the Appellant's exceedingly poor driving record. I recommend the dismissal of the Appellant's appeal.

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Larry Franklin, appeals the decision of the Respondent, City of Leominster, to bypass him for an original appointment to the position of firefighter. The appeal was timely filed. A hearing was held on August 20,

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2010, at the office of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. There is one cassette tape of the hearing.

I admitted eighteen documents into evidence. Exs. 1-18. Mr. Franklin testified on his own behalf. The Respondent called two witnesses: Acting Fire Chief Daniel Kirouac and Leominster Mayor Dean Mazarella.

FINDINGS OF FACT

Based upon the documents entered into evidence and the testimony of the witnesses, I make the following findings of fact:

1. The Leominster Fire Department submitted a request to the Massachusetts Human Resources Division for a list of eligible candidates to become firefighters on March 1, 2010. Ex. 1.
2. The City of Leominster was seeking to appoint seven permanent, full-time firefighters, and was provided a list of nineteen certified candidates by the Commonwealth's Human Resources Division, Civil Service Unit. Ex. 2.
3. Seventeen of the candidates indicated their willingness to accept an appointment to the seven positions. Ex. 2.
4. Of the seventeen willing candidates, Mr. Franklin was listed seventh based on his Civil Service Exam score. Ex. 2, Testimony Kirouac.
5. The City of Leominster convened an interview panel to interview all seventeen willing candidates. The panel consisted of Acting Fire Chief Kirouac, then-Human Resources Director Sandra Leach, and Fire Lieutenant Anthony LeFebvre. Testimony Kiroauc.
6. The members of the interview panel agreed that Mr. Franklin was likeable and performed well during the interview process. Testimony Kirouac.

7. Following the interviews, the City offered positions conditionally to seven of the candidates interviewed, including Mr. Franklin. Testimony Franklin, Kirouac.

8. Respondent then proceeded to check the backgrounds, criminal history, and driving records of the seven candidates, and administer drug tests to them. Respondent had refrained from these procedures earlier to avoid cost to the taxpayers. Testimony Kirouac.

9. Mr. Franklin's work history and personal references were uniformly positive. Ex. 15, Testimony Kirouac.

10. This was the first occasion in which Respondent engaged in a review of employment candidates' driving records. Testimony Kirouac.

11. Mr. Franklin was a member of the United States Marine Corps from 2001 to 2005, when he was honorably discharged. Mr. Franklin testified that during his service in the Marine Corps, he frequently drove in Iraq under stressful conditions. Testimony Franklin.

12. Employment as a Leominster firefighter is highly driving-intensive, particularly in the first five years of employment. Much of the driving occurs under stressful conditions. Testimony Kirouac.

13. Candidates James Cameron, Jonathan Campagna and Mr. Franklin all had entries on their driving records that were worrisome to the City and Mayor Mazzarella. Ex. 6, Ex. 10, Ex. 13.

14. Mr. Franklin first received his driver's license in 1998. Since then, his license has been suspended three times, most recently in 2009 for refusing a chemical test. Mr. Franklin also pled guilty to a DUI in 2004. Mr. Franklin has additionally been involved in multiple traffic accidents and moving violations. Ex. 5, Ex. 13.

15. In August 2009, Mr. Franklin was stopped while operating a motor vehicle and refused a chemical test, resulting in the suspension of his license. When asked, at the hearing in this matter, why he refused the chemical test, he responded that he does not believe in chemical tests and that he knows "his limit." Ex. 5, Testimony Franklin.

16. In August 2007, Mr. Franklin lost control of his vehicle and drove his car over a curb, damaging a tree, bark mulch and two granite signs. Mr. Franklin's car struck objects with enough force to deploy the car's airbag and shred its tires. Mr. Franklin then left the scene of the accident and parked the car at another location where it was discovered by police. Mr. Franklin did not report the accident to the police that night, but did appear at the police station the following night to file a report. Mr. Franklin lost control of the vehicle while he was texting. The [municipality] Police Department ultimately issued Mr. Franklin citations for leaving the scene of an accident, property damage, failure to stay in marked lanes and reckless operation of a motor vehicle. Ex. 17, Ex. 18, Testimony Mazzarella, Testimony Franklin.

17. In 2006, Mr. Franklin was found responsible for failure to keep right. Ex. 5, Ex. 13, Testimony Franklin.

18. In 2004, Mr. Franklin was charged with driving under the influence in North Carolina. He later pled guilty to the charge. Ex. 5, Ex. 13, Testimony Franklin.

19. In 2001, Mr. Franklin was found responsible for failure to stop. Ex. 5, Ex. 13, Testimony Franklin.

20. In 2000, Mr. Franklin was stopped and found responsible for speeding. During the stop, he failed to produce his license and registration. Ex. 5, Ex. 13.

21. In 1999, Mr. Franklin incurred citations that included two failures to stay in the right lane, an additional accident in Leominster, an additional speeding violation,

and an additional failure to stop. When stopped for this last offense, he failed to produce his license and registration. Ex. 5.

22. In 1998, Mr. Franklin was cited for two accidents, and a failure to stop. Ex. 5.

23. The aforementioned incidents on Mr. Franklin's driving record have resulted in three license suspensions, the most recent of which occurred in 2009. Ex. 5, Testimony Franklin.

24. Mr. Franklin's violations, accidents and suspensions resulted in over thirty entries on his driving record. Ex. 13.

25. Candidate James Cameron was found guilty of driving under the influence in 2002. His driving record revealed no suspensions or other incidents. Ex. 6.

26. Candidate Jonathan Campagna's driving record revealed seven moving violation between 2000 and 2010. His record contained seven entries, and showed no suspensions or DUIs. Ex. 10.

27. Mr. Campagna and Mr. Cameron were listed fourth and fifth, respectively, on the list of candidates provided by the Commonwealth. Both of their ranks were higher than Mr. Franklin's, who was listed seventh. Ex. 2.

28. No conditionally accepted candidate, including Mr. Campagna and Mr. Cameron, had a driving record as poor as Mr. Franklin's record. Ex. 5-12, Testimony Mazarella.

29. The panel of interviewers were responsible for recommending candidates to be hired for the open firefighting positions. Testimony Kirouac.

30. The Mayor Richard Mazzarella was the appointing authority in charge of selecting the firefighters. Testimony Kirouac, Testimony Mazzarella.

31. Mayor Mazzarella gave consideration to the candidates, their driving records, and any patterns of conduct that the records might suggest. The Mayor spent hours arranging piles of papers on his desk and writing comparison charts on his whiteboard while analyzing the driving records. Testimony Mazzarella.

32. Mayor Mazzarella had phone conversations with Mr. Cameron and Mr. Campagna to discuss their driving records. Testimony Mazzarella.

33. At Mr. Franklin's request, Mayor Mazzarella met with Mr. Franklin to discuss his driving record, and take a "fresh look" at it. Testimony Mazzarella.

34. On June 10, 2010, Mayor Mazzarella notified Mr. Franklin by letter that he was being bypassed for appointment as a firefighter. Ex. 3.

35. On June 21, 2010, Mr. Franklin filed a timely notice of appeal with the Civil Service Commission.

CONCLUSION AND RECOMMENDATION

In a bypass appeal, the governing statute, G.L. c. 31, § 2(b), requires the Civil Service Commission to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303 (1997); *Mayor of Revere v. Civil Serv. Comm'n*, 31 Mass. App. Ct. 315, 320 n.10, 321 n.11, 322 n.12 (1991). Reasonable justification, in the context of review, 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." *Selectmen of Wakefield v. Judge of the First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928); *Comm'rs of Civil Serv. v. Mun. Court of the City of Boston*, 359 Mass. 211, 214 (1971).

“In making that analysis, the commission must focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control.” *City of Cambridge*, 43 Mass. App. Ct. at 304, citing *Murray v. Second Dist. Court of East. Middlesex*, 389 Mass. 508, 514 (1983); *Kelleher v. Personnel Adm’r of the Dept. of Personnel Admin.*, 421 Mass. 382, 387 (1995); *Police Comm’r of Boston v. Civil Serv. Comm’n*, 22 Mass. App. Ct. 364, 370 (1986). “When there are, in connection with personnel decisions, 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.” *City of Cambridge*, 43 Mass. App. Ct. at 304, citing *School Comm. of Salem v. Civil Serv. Comm’n*, 348 Mass. 696, 698-99 (1965); *Debnam v. Belmont*, 388 Mass. 632, 635 (1983); *Commissioner of Health & Hosps. of Boston v. Civil Serv. Comm’n*, 23 Mass. App. Ct. 410, 413 (1987).

“In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion.” *City of Cambridge*, 43 Mass. App. Ct. at 304-05, citing *Callanan v. Personnel Adm’r for the Comm.*, 400 Mass. 597, 601 (1987); *Mayor of Revere*, 31 Mass. App. Ct. at 320-21. In cases involving the bypass of a candidate on the civil service list in favor of another candidate ranked lower on the list it is appropriate to consider the comparative qualifications of each candidate in determining whether the appointing authority has demonstrated reasonable justification. The Commission, however, may not substitute its judgment about a valid exercise of discretion based on merit or policy considerations as weighed by the appointing authority. *City of Cambridge*, 43 Mass. App. Ct. at 304.

In this case, the appointing authority, Mayor Mazzarella, bypassed Mr. Franklin, Mr. Franklin, because he had a poor driving record. Mr. Franklin argues that he deserves the position, that his driving record was not as bad as it looks, that his record has improved in recent years, and that there were other candidates with poor driving records who were ultimately appointed by the City.

Mayor Mazzarella had reasonable justification to bypass Mr. Franklin for the position of Leominster firefighter because of Mr. Franklin's poor driving record. The Massachusetts Civil Service Commission has previously concluded that a poor driving record is a sufficient basis on which to bypass a candidate for a firefighting position. *Ovoian v. Town of Watertown*, G1-04-467, 20 MCSR 507 (2007); *Campbell v. Boston Fire Dep't*, G1-08-46/CS-08-419 at 16 (2009).

I agree that Mr. Franklin's driving record is exceedingly poor, verging on dangerous. Mr. Franklin's license has been suspended three times since he first received it in 1998, most recently in 2009 for refusing a chemical test after being stopped by police. Mr. Franklin pled guilty to charges of driving under the influence in 2004. Mr. Franklin has also been issued citations for multiple car accidents and moving violations. In 2007, Mr. Franklin drove his car over a curb while texting, causing property damage to a tree and signs, and striking objects with such force that his car's airbag deployed and his tires were shredded. On that occasion, Mr. Franklin was issued citations for leaving the scene of an accident, property damage, failure to stay in marked lanes and reckless operation of a motor vehicle. In 2006, Mr. Franklin was found responsible for failure to keep right. Prior to his driving under the influence conviction in 2004, Mr. Franklin had accumulated surchargeable violations that included three failures to stop, two speeding

violations, two failures to stay in the right lane, three additional car accidents, and two instances in which he failed to produce his license and registration.

Mayor Mazzarella testified that driving is “extremely important” in performing duties as a Leominster firefighter, particularly in the first five years. A valid Massachusetts driver’s license is a prerequisite to working as a firefighter in Leominster. Much of the driving done by firefighters on duty is done under stressful conditions. Because of the relatively small size of the Leominster department, every firefighter must be able to operate all of the department’s vehicles, regardless of whether such operation is part of the employee’s ordinary duties, at any moment. The city must consider the physical dangers, logistical problems and potential legal liabilities that might arise from employing an applicant with a poor driving history. A firefighter with a pattern of past license suspensions would be unable to perform his duties, should his license again be suspended or revoked.

Mayor Mazzarella was reasonably justified in bypassing Mr. Franklin because of his poor driving record. Mr. Franklin’s three license suspensions, chemical test refusal, DUI, multiple accidents and numerous moving violations make it reasonable to believe that Mr. Franklin was at high risk for causing injury to others or their property. Additionally, Mr. Franklin’s three past license suspensions indicate that his license may be suspended or revoked in the future, which would stop Mr. Franklin from discharging all of his duties.

Mr. Franklin argues that his bypass was unfair because two other candidates who were appointed, James Cameron and Jonathan Campagna, also had flawed driving records. This argument must fail because both Mr. Cameron and Mr. Campagna were ranked higher on the civil service list than Mr. Franklin. Therefore, Mr. Franklin was not

bypassed relative to Messrs. Cameron and Campagna. *See, e.g., Cotter v. City of Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002) (where civil service exam results in a tie-score and appointing authority promotes some but not all of the candidates, no actionable bypass has occurred).

Moreover, if I consider the merits of his argument, Mr. Franklin's record was far worse than Mr. Cameron's and Mr. Campagna's records. While Mr. Franklin had three suspensions, a chemical test refusal, a DUI, multiple accidents, and moving violations that collectively amounted to over thirty entries on his driving record, Mr. Campagna had only seven entries from moving violations, and had never received a DUI or license suspension. Mr. Cameron had received only a single DUI from 2002, and no suspensions. Although Mr. Franklin asserts that Mr. Cameron's license had been suspended, he offers no evidence to support his assertion, and Mr. Cameron's driving record entered into evidence indicates no such suspensions. After a review of the candidates' records, Mayor Mazzarella determined that Mr. Cameron and Mr. Campagna had driving records far less egregious than Mr. Franklin's record, and had demonstrated patterns of growth and change that Mr. Franklin had not demonstrated. The Mayor scheduled a personal meeting with Mr. Franklin hoping to be convinced that Mr. Franklin had "turned over a new leaf." After the meeting, Mayor Mazzarella was not so convinced.

To the contrary, Mr. Franklin argues that he has demonstrated a recent pattern of growth and change, indicating that his driving record has improved in recent years. This assertion is not borne out by the evidence, as, in 2007, Appellate was responsible for a serious accident that resulted in his being cited for reckless driving, property damage and leaving the scene of an accident. Mayor Mazzarella testified that leaving the scene of the

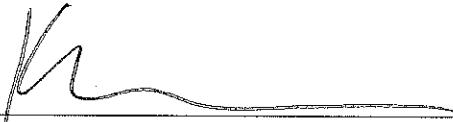
accident was particularly indicative of questionable character. Even more importantly, as recently as 2009, Mr. Franklin had refused a chemical test; this resulted in a license suspension. When questioned as to whether he had, in fact, refused the chemical test, Mr. Franklin responded: "Absolutely. I don't believe in them. I know my limits." This response demonstrates an unwillingness to support and conform to the laws and policies of the Commonwealth, a baffling attitude for a prospective public employee professing to have recently grown and matured.

Finally, Mr. Franklin asserts that he deserves the position, and could handle driving under stress, because of his experience driving through stressful conditions in Iraq while in the Marine Corps. While I do not doubt that Mr. Franklin could have driven under the severest of conditions while serving in Iraq, he presented no meaningful evidence of his driving in Iraq. In any event, Mr. Franklin's civilian driving record was exceedingly poor by any standard, his military service notwithstanding. Mayor Mazzarella and the interview panel were justified in considering him to be a high risk candidate that should be bypassed in the interest of the City of Leominster. *See, e.g., Driscoll v. Boston Police Dept.*, 20 MCSR 477 (2007) (police officer candidate properly bypassed for his poor driving record, despite long and commendable history of military service).

I conclude that the City's reasons for bypassing Mr. Franklin were true and were applied equally to the other bypassed candidates, the allegations of poor driving are capable of substantiation and the City did not use Mr. Franklin's driving record as a pretext for other impermissible reasons to bypass him. *See Borelli v. MBTA*, 1 MCSR 6 (1988).

The Appointing Authority's decision to bypass Mr. Franklin was reasonably justified. I recommend the dismissal of Mr. Franklin's appeal.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton, Esq.
Administrative Magistrate

DATED: **NOV -1 2010**