

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DANIEL GOULD,
Appellant,

CASE NO: G1-10-101

v.

**BOSTON FIRE DEPARTMENT and
HUMAN RESOURCES DIVISION,**
Respondent

Appellant's Attorneys:

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Commissioner:

Paul M. Stein

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

The Appellant, Daniel Gould, appealed to the Civil Service Commission (Commission) claiming to be aggrieved by the actions of the City of Boston (Boston) and the Massachusetts Human Resources Division (HRD), which removed his name from the list of candidates who were eligible to claim residency in Boston for purposes of consideration for appointment to the position of Firefighter with the Boston Fire Department (BFD). After considering certain preliminary procedural issues, the Commission determined that the Appellant was entitled to appeal the residency issue

pursuant to Mass. G.L.c.31,§2(b). In lieu of a full evidentiary hearing, the Appellant was required to file a Statement of the Evidence upon which his residency claim was based. On September 29, 2011, the Appellant and Boston filed Motions for Summary Decision. HRD filed a Motion for Summary Decision on November 16, 2011. On November 22, 2011, the Appellant opposed both Boston's motion and HRD's motion. Post-Hearing Submissions were received from Boston on March 15, 2012 (PH#1), and from the Appellant on March 30, 2012 (PH#2) and April 2, 2012 (PH#3).

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, argument of counsel, and inferences reasonably drawn, I find the following facts to be undisputed:

1. On or about June 20, 2006, the Appellant, Daniel Gould, took and passed the 2006 Entry Level Firefighter Examination. He declared himself entitled to preference as a Boston resident. His name was placed on the eligible list as a non-veteran resident of Boston, tied with a large group of other non-veteran Boston residents. (*Claim of Appeal; HRD Motion; Appellant's Opposition to Respondents' Motions*)

2. On or about June 22, 2007, HRD issued Certification No. 270615 to the BFD to begin the process of hiring new firefighters, upon which Mr. Gould's name appeared. Mr. Gould received notice of the process and signed willing to accept appointment. On December 13, 2007, the BFD sent Mr. Gould a letter advising him that his name had not been reached for consideration on Certification No. 270615. BFD's letter was sent to the address that Mr. Gould claimed as his residence in Boston: 1313 Washington Street, Boston MA 02118. (*Boston Motion; Appellant's Opposition to Respondents' Motions; Boston's PH#1; Appellant's PH#2 &3*)

3. Mr. Gould had established residence at 1313 Washington Street in May 2005. He provided to the Commission a copy of a notarized letter from his landlord at that address, attesting to that fact, as well as copies of bank statements, showing his residency at that address on or before May 25, 2005, as well as a Massachusetts Driver's License issued 5-19-2005 with that address. (*Appellant's PH#2 & PH#3*)

4. On or about February 7, 2008, HRD issued a new Certification No. 2800978 to the BFD, on which Mr. Gould's name appeared. He signed willing to accept and BFD began processing his application. (*Boston Motion; Appellant's Statement of Evidence; Appellant's Opposition to Respondents' Motions Appellant's PH#2*)

5. In March 2008, Mr. Gould was contacted by BFD Lt. Kevin McCarthy, who was conducting a background check concerning Mr. Gould's application. Lt. McCarthy visited Mr. Gould's (new) Boston apartment at 401 Mt Vernon Street as well as his (prior) Boston apartment at 1313 Washington Street. (*Appellant's Statement of Evidence; Appellant's Opposition to Respondents' Motions; Appellant's PH#2*)

6. According to Mr. Gould, he provided the original of the notarized letter from his landlord at 1313 Washington Street to Lt. McCarthy. (*Appellant's PH#2*)

7. On or about April 26, 2008, Mr. Gould took the next scheduled Entry Level Firefighter Examination, and passed both the written component and the Entry Level Physical Abilities Test (ELPAT) component, achieving a total final score in a band from 95 to 96 (out of 100). He was again listed as a resident of Boston, at 401 Mt Vernon Street, Apt 725, Boston, MA 02125. The notices from HRD that he passed the examination, were sent on or about July 23, 2008 and November 13, 2008 to that address. (*Boston Motion; Appellant's Opposition to Respondents' Motions*)

8. On or about May 29, 2008, Mr. Gould received a letter from the BFD stating that he had not been reached for consideration on Certification No. 280097. BFD's letter was sent to Mr. Gould's (new) Boston address: 401 Mt. Vernon Street. (*Boston Motion*)

9. In July 2008, Mr. Gould was hired full time by the Townsend Fire Department. A condition of his employment was agreement to move within fifteen miles of Townsend within six months of hire. (*Appellant's Statement of Evidence*)

10. On or about August 15, 2008, HRD issued Certification No. 280776 to the BFD for appointment of twenty-seven full-time firefighters. Mr. Gould's name appeared on the list as a Boston resident, with his address listed as "401 MT VERNON ST APT 725 BOSTON MA 0212 [sic]. Mr. Gould signed willing to accept appointment and submitted his application on or about August 19, 2008. (*Boston Motion*)

11. As part of the application process, Mr. Gould provided the BFD with information about his residences, including a statement of his prior residence at 1313 Washington Street, Boston from "5/05 – 4/08", (*Boston PH#1*)

12. Mr. Gould's application packet also contained the following documentation:

- a. W-2 Forms issued by the Town of Lunenburg for wages paid to Mr. Gould in 2005-\$3,111.48, 2006-\$13,0038.97, and 2007-\$16,094.71, listing his address as: 81 Turkey Hill Road, Lunenburg, MA 01462;
- b. Mr. Gould's 2006 Federal Income Tax Return also showing his address as: 81 Turkey Hill Rd, Lunenburg, MA 01462;
- c. A Massachusetts RMV Registration dated 09/01/07 issued to Ganda E. Gould and Daniel Ernest Gould, at 81 Turkey Hill Rd, Lunenburg, MA 01462-1444;

- d. Excise Tax payment records for the above pick-up truck for 2006 and 2007 issued to Ghada E. Gould, 81 Turkey Hill Rd, Lunenburg, MA 01462-1444;
- e. Mr. Gould's Employment History (from application) for Townsend Fire-EMS Dep't (7/08 -); Lunenburg Fire Dep't (5/05 -) and Patriot Ambulance, Chelmsford (4/06-12/06);
- f. Mr. Gould's References (from application) from two Lunenburg firefighters.

(Boston Motion)

13. In or about September 2008, a BPD investigator spoke by telephone with Mr. Gould concerning the background check he was doing on him. The investigator also contacted Mr. Gould's current employer, the Townsend Fire Department. *(Appellant's Statement of Evidence; Appellant's Opposition to Respondent's Motions)*

14. In or about October 2008, Mr. Gould contacted the BFD. He spoke with a woman whom he identified as "Erica" in the office of the BFD's Director of Personnel, Robert Moran. She informed Mr. Gould that he had been removed from consideration because of residency. He was told that he would receive a more detailed explanation from HRD. *(Appellants Statement of Evidence: Appellant's Opposition to Respondent's Motion)*

15. Mr. Gould then contacted HRD and was told he would be receiving a letter and he should wait for the letter before appealing to the Commission. Mr. Gould never received any letter from HRD or the BFD. *(Appellants Statement of Evidence: Appellant's Opposition to Respondent's Motion)*

16. On December 29, 2008, the BFD cancelled the hiring process and returned the Certification No. 280776 to HRD without making any appointments. *(Boston Motion)*

17. In December 2009, special legislation was enacted that authorized Boston to use the names of candidates listed on Certification No. 280776 and to make the next round of firefighter hiring from those names. (*Boston Motion; Administrative Notice [St.2009, c. 173]*)

18. In January, 2009, Mr. Gould moved to Townsend in order to meet the residency requirement of his employment with the Townsend Fire Department. (*Appellant's Statement of Evidence; Appellant's Opposition to Respondents' Motions*)

19. On March 29, 2010, pursuant to the special legislation, BFD received Certification No. 807180 containing the names of candidates from Certification No. 280776 for selection of the next class of firefighters to be hired. (*Boston Motion*)

20. Mr. Gould's name was omitted from Certification No. 807180 and he received no formal notice from BFD inviting him to participate in the 2010 hiring process. It was not until April 2010 that he came to learn that the BFD had hired others from the list on which he had appeared. (*Boston Motion; Appellant's Statement of Evidence; Appellant's Opposition to Respondents' Motions*)

21. It is undisputed that at least six non-veteran candidates who claimed Boston residency and appeared ranked lower than Mr. Gould on Certification No. 280776 were hired by the BFD from Certification No. 807180. (*Boston Motion*)

22. Mr. Gould provided the following additional evidence residence in Boston:

- a. A City of Boston 2007 Annual Resident Listing (Census) form issued to the "Gould Family" at 1313 Washington Street, Apt. 408, and listing Daniel E. Gould as one of the two residents of that apartment;

- b. Mr. Gould's 2006 Form W-2 from Patriot Ambulance listing his address as:
1313 Washington St, Apt. 408, Boston, MA 02118;
 - c. An IRS Notice dated May 12, 2008 to Mr. Gould regarding his Economic Stimulus Payment, addressed to him at: 1313 Washington Street, Apt. 408, Boston, MA 02118-2158;
23. Mr. Gould provided a sworn affidavit that attested to the following additional facts, all of which appear undisputed:
- a. He moved to Boston in 2005 from Palm Harbor, Florida, where he had attended St. Petersburg College;
 - b. He was hired as a call firefighter for the Lunenburg Fire Department in March 2005, prior to completing college, and provided his father's address to that department as his mailing address, as he had not yet moved back to Massachusetts from Florida;
 - c. He kept the same mailing address for purposes of his employment with the Lunenburg Fire Department until November 2011, and continued to receive his W-2 Forms at that address through the year 2010;
 - d. He started working for Patriot Ambulance, based in Chelmsford, Massachusetts in April 2006 and his W-2 for 2006 from Patriot Ambulance shows his Boston address;
 - e. He never claimed civil service residency preference for Lunenburg;
 - f. He stated that did not retake the Entry Level Firefighter's Examination in 2010, because he had moved to Townsend in January 2009 and could no longer claim a residency preference for Boston;

- g. He slept most nights in his Boston apartment, kept his personal belongings there and received most (but not all) mail at that address;
- h. He registered to vote in Boston and performed jury duty there;
- i. While a call firefighter for the Lunenburg Fire Department, he sometimes spent the night at the firehouse. He did not sleep at his father's house;
- j. He kept the pick-up truck principally garaged at father's address. It was registered there and excise taxes paid to Lunenburg because he understood that was required by motor vehicle and insurance laws.

(Appellant's Statement of Evidence; Appellant's Opposition to Respondent's Motions)

24. Mr. Gould also made a proffer of additional evidence that he expected to adduce through third party witnesses, including desk staff at his Boston apartment and friends and relatives who would confirm the facts stated above concerning Mr. Gould's physical residence at his Boston apartments. *(Appellant's Statement of Evidence)*

CONCLUSION

Summary

Mr. Gould presented substantial evidence that he resided in Boston for at least one year prior to taking the 2006 and 2008 Entry Level Firefighter Examinations and was lawfully entitled to be placed on all certifications for appointment as a BFD firefighter as a Boston resident. By omitting him from his proper place on the the March 2010 certification, and hiring candidates ranked below where he should have been placed, Mr. Gould's civil service rights were prejudiced. He is entitled to be placed at the top of the current and future lists until he receives at least one future consideration for appointment as a BFD Firefighter.

Applicable Legal Standard

A motion for summary decision of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. To survive a motion for summary decision, the non-moving party must offer “specific facts” which establish “a reasonable hope” to prevail after an evidentiary hearing. Conclusory statements, general denials, and factual allegation not based on personal knowledge are insufficient to establish a triable issues. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Relevant Civil Service Law

Boston gives preference to candidates for civil service positions who have maintained a Boston residence, as authorized by Mass. G.L.c.31, §58, which provides, in part:

“[U]pon written request of the appointing authority to the administrator [HRD] the administrator shall, when certifying names from said eligible list for original appointment to the . . . fire force of a city or town, place the names of all persons who have resided in said city or town for one year immediately prior to the date of examination ahead of the name of ant person who has not so resided.”

Id. (*emphasis added*)

G.L.c.31, §2(b) authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the Massachusetts Human Resources Division (HRD) or, in certain cases by appointing authorities to whom HRD has delegated its authority, and

which actions have abridged their rights under civil service laws. The statute provides:

No person shall be deemed to be aggrieved . . . unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator [HRD] was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the

Commission to remediate a violation of civil service law:

If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights. (emphasis added)

Procedural Issues

Boston asserts that Mr. Gould's appeal must be dismissed on procedural grounds, contending that Mr. Gould failure to take the 2008 and 2010 Entry Level Firefighter Examinations, and his failure to file his appeal until May 2011, amounts to inequitable conduct that precludes him from seeking relief from the Commission. These arguments are unavailing.

First, Boston is mistaken that Mr. Gould failed to preserve his standing as a Boston resident by declining to take future examination. In fact, he DID take the 2008 examination and scored well. Moreover, because of the unique circumstance of this case, the appointments in question were actually made from a Certification that was derived from the 2006 list, not the 2008 or subsequent list. The harm to Mr. Gould arises because his name was improperly removed from the 2006 list, not because of any choices he allegedly made not to take any subsequent examination. Thus, this case is distinguishable

from other cases in which a candidate chose to “roll the dice” and rest on his current exam score, rather than take the next examination that could possibly risk him winding up lower on the list. See, e.g., Callanan v. Personnel Administrator, 400 Mass. 597, 600-601 (1987) (*emphasis added*) See also Awad v. HRD, 25 MCSR 32 (2012) and cases cited (Commission denied request for equitable relief to revive expired eligibility on a merged list after failure to register for next available examination); Regan v. City of Salem & HRD, 24 MCSR 490 (2011) (same); Monk v. City of Salem & HRD, 24 MCSR 481 (2011) (same); Kochansky v. City of Salem & HRD, 24 MCSR 472 (2011) (same); Fontaine v. HRD, 24 MCSR 469 (2011) (same); Bourgeois v. HRD, 24 MCSR 466 (2011) (same); Delaney v. HRD, 24 MCSR 110 (2011) (same); Caccamo v. HRD, 24 MCSR 100 (2011) (same).

Second, Mr. Gould’s appeal is not untimely. While he was given some idea that Boston had an issue with his residency, Boston cancelled the hiring process in December 2008 and, therefore, no written reasons for bypass were issued. It was not until Mr. Gould got wind of the renewed hiring process that began with the Certification No. 807180 dated March 29, 2010, of which he was never notified formally, that he filed appeal, which was filed on May 10, 2010. Thus, this appeal was filed well within the 60 day period within which a person may challenge a non-selection under the Commission’s 60-day limitations period for filing a bypass appeal.

Residency Preference

The sole basis upon which Boston asserts that it was entitled to omit Mr. Gould’s name from the March 2010 Certification No. 807180 was its conclusion that he was not a Boston resident.

“Residence” means “the physical location of the employee’s house or other dwelling place.” Crete v. City of Lawrence, 18 MCSR 22, 23 (2005) citing Doris v. Police Commissioner of Boston, 374 Mass. at 445 (1978). HRD’s Verification of Applicant’s Residence Preference form, states: ... “[P]ursuant to G.L. Chapter 31, Section 58 [a job applicant] [must] . . . maintain residence in the Appointing Authority’s community for a full year preceding the date of the examination. Residence means the principal place of domicile of the applicant. *Principal place of domicile means an applicant’s true, fixed and permanent home.*” (*emphasis added*)

The facts upon which Boston based the conclusion that Mr. Gould had not resided in Boston for a year prior to the April 2006 examination were several documents – all, or substantially all, of which Mr. Gould, himself, provided to the BFD in the course of its prior background investigation of his 2008 application. None of this evidence, either in isolation or as a whole, establish more than the fact that Mr. Gould had a part-time job in Lunenburg and used his family home address in Lunenburg for tax reporting purposes. All other undisputed evidence points clearly to the fact that, from sometime in May 2005 until January 2009, Mr. Gould occupied an apartment in Boston as his primary residence.

Boston relies on the prior case of LaFlamme v. Town of Shrewsbury, 21 MCSR 440 (2008) *vacated sub non*, Town of Shrewsbury v. Massachusetts Civil Service Comm’n, Worcester Sup. Ct. C.A.2008CV2124 (2009). In the LaFlamme case, the evidence established that Mr. LaFlamme had been renting and living on Cape Cod, and had concealed that fact when he applied to the Shrewsbury Fire Department, claiming he resided with his family in Shrewsbury and omitted any reference to his Cape Cod residence. See also Layton v. City of Somerville, 24 MCSR 619 (2011) (evidence that claimed residence was a sham and applicant physically lived elsewhere)

Here, Mr. Gould was, at all times, fully forthcoming about his connection to Lunenburg. Indeed, it would have behooved him to claim residence in Lunenburg when he went to work for Patriot Ambulance in April 2006, as that would have been much closer to its headquarters in Chelmsford than to Boston. Mr. Gould's connection to Boston is confirmed by considerable documentary evidence which the BFD either had procured or clearly could have procured. The BFD investigator actually visited both of his apartments and, despite this first-hand knowledge, never questioned the veracity of Mr. Gould's (and, perhaps, his landlord's) sworn statements that he had lived at 1313 Washington Street, Boston. Under these circumstances, there is no value to conducting an evidentiary hearing when the clear and convincing, undisputed facts establish that Mr. Gould's physical residence for the relevant period was in Boston, not Lunenburg.

Relief to be Granted

Pursuant to the authority granted under Chapter 310 of the Acts of 1993, the Commission hereby ORDERS that the City of Boston and the Massachusetts Human Resources Division take the action necessary to record that the Appellant Daniel Gould duly established residence in Boston on or before May 19, 2005 and duly maintained a Boston residence through the date of the 2008 Entry Level Firefighter's examination; to place the Appellant, Daniel Gould, at the top of the current and future certifications for appointment to the position of Firefighter in the Boston Fire Department until such time as he shall have received at least one consideration for such appointment; and, in the event he receives such appointment as Firefighter, to retroactively adjust his civil service seniority date, so that he receives the same civil service seniority date as the earliest seniority date established for the candidates hired from Certification No. 807180 who

were listed on Certification No. 280786 as tied with the Appellant. Nothing in this Decision shall entitle the Appellant to any retroactive pay or benefits.

The Appellant's Motion for Summary Decision is GRANTED. Boston's and HRD's Motions for Summary Disposition are DENIED. The Appeal of the Appellant, Daniel Gould, is hereby *allowed*.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on April 19, 2012.

A True Record. Attest:

Commissioner

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 the 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 a Civil Service Commission's final decision.

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:

Galen Gilbert, Esq. (for Appellant)
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Robert J. Boyle, Esq. (for Boston Fire Department)
Elizabeth M. Whitcher, Esq. (HRD)