

**COMMONWEALTH OF MASSACHUSETTS**

**Civil Service Commission**

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

LORD GRACE,  
Appellant

v.

G1-04-326

CITY OF NEWTON,  
Respondent

Appellant's Attorney:

Frank J. McGee, Esq.  
1952 Ocean Street  
Marshfield, MA 02050-3424

Respondent's Attorney:

Donnalyn B. Lynch Kahn, Esq.  
City of Newton – Legal Department  
1000 Commonwealth Avenue  
Newton, MA. 02460

Commissioner:

John E. Taylor

**DECISION**

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Lord Grace, is appealing the decision of the state's Human Resources Division (hereafter "HRD") to accept the reasons proffered by the City of Newton (hereafter "City" or "Appointing Authority") to bypass him for an original appointment to the position of permanent firefighter. The appeal was timely filed. A full hearing was held on March 9, 2005 at the offices of the Civil Service Commission. One tape was made of the hearing. One (1) exhibit was stipulated to the by parties and entered into the record. Additionally, the City submitted four (4) exhibits and Appellant submitted two (2) exhibits, all of which were entered into the record.

## **FINDINGS OF FACT**

Based upon the documents entered into evidence (Exhibits 1-7), and the testimony of the Appellant, Lord Grace; Delores Hamilton, Director of Human Resources - City of Newton; and Bruce Proia, Assistant Fire Chief – City of Newton; I make the following findings of fact:

1. The City of Newton is a municipal corporation and the employer and appointing authority in the instant case. (Testimony)
2. In January 2004, the City of Newton submitted a civil service requisition from HRD in order to fill eight (8)<sup>1</sup> permanent firefighter positions within the City of Newton's Fire Department. (Testimony, Joint Exhibit 1).
3. On January 28, 2004, HRD issued a certified eligibility list (Certification 241048) which directed that "selection must be of 8 of the first 17 highest who will accept" the Permanent Firefighter position with the City of Newton Fire Department. (Joint Exhibit 1).
4. Appellant was placed on the January 28, 2004 certified eligibility list by HRD in a tie for sixteenth (16<sup>th</sup>) on the certified eligibility list following Alexander Sorbonne. (Joint Exhibit 1).
5. Eight (8) applicants ahead of Appellant on the certified eligibility list were subsequently bypassed for various reasons, including failure to sign the certification and/or failure to pass the Physical Aptitude Test ("PAT"). (Joint Exhibit 1, Respondent Exhibit 4).

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<sup>1</sup> This number was subsequently increased to twelve (12) permanent firefighter positions.

6. The City of Newton conducts Criminal Offender Record Information ("CORI") background checks on all applicants for positions with the City of Newton which might expose the applicant to contact with the elderly, disabled or children. Included in the categories of applicants who are subject to CORI checks at the City are applicants for the position of firefighter. (Testimony).

7. The Criminal History Systems Board has adopted the following grant of access to CORI for municipalities, including the City of Newton, under the authority of G.L. c. 6, s. 172:

Massachusetts and out of state municipalities may access and receive conviction and pending case CORI for the purpose of screening otherwise qualified personnel who may enter private residences while on municipal business and/or have the opportunity for direct contact with children, disabled persons and the elderly.

8. The Criminal History Systems Board has adopted the following grant of access to CORI for municipalities, including the City of Newton, under the authority of G.L. c. 6, s. 172:

Fire Chief and appointing authorities of firefighters may receive CORI pertaining to conviction and pending criminal case data for the purpose of screening otherwise qualified firefighter candidates. (Testimony).

9. In accordance with G.L. c. 6, s.172 and the City of Newton's hiring policy, Ms. Hamilton conducted CORI checks of all applicants (including Appellant) for the position of firefighter on the January 28, 2004 certified eligibility list. (Testimony)

10. Appellant's CORI check revealed information that the City of Newton considers a disqualifying offense. (Testimony, Respondent Exhibit 1).
11. There is a list of disqualifying offenses that was provided to the City of Newton by the Criminal History Systems Board. It includes three categories of disqualifying offenses: A: Crimes that are mandatory disqualifications; B. Mandatory 10-year disqualifications; and C. Discretionary disqualifications. (Testimony, Respondent Exhibit 2. It is noted that Exhibit 2 is from the Mass. Health and Human Services, Human Resource Policy Manual but the Respondent indicates, in its Post-Hearing brief, "Apparently, the Criminal History Records Board publishes to municipalities the same disqualification list used by the Executive Office of Health and Human Services.).
12. Appellant's crime fell under a mandatory disqualification category as defined in the disqualifications. (Testimony, Respondent Exhibit 2).
13. Ms. Hamilton thereafter notified the administrative offices of the City of Newton Fire Department that Appellant had a mandatory disqualification as a result of a CORI check. (Testimony).
14. In turn, the administrative offices of the City of Newton Fire Department notified HRD that the Appellant had "an unacceptable criminal background check." (Testimony, Joint Exhibit 1).
15. HRD approved the City of Newton's reasons for bypassing the Appellant, as well as several other candidates ahead of the Appellant on the certified eligibility list. Thereafter, by letter dated December 10, 2004, HRD notified the Appellant of the bypass decision and the reasons therefor. (Testimony, Respondent Exhibit 3).

16. The Appellant was not selected for the position of permanent firefighter with the City of Newton.
17. The Appellant timely filed an appeal of the bypass decision.
18. Ms. Hamilton credibly testified as to her CORI training, the uniform use of CORI by the City of Newton for all candidates for employment (including firefighters), the mandatory disqualification of the Appellant given the nature of his prior conviction, and to the fact that only legitimate and relevant factors were considered in making the decision to bypass the Appellant. (Testimony).
19. Assistant Chief Proia credibly testified as to the City of Newton's hiring procedure, the receipt of a signed authorization from the Appellant consenting to a background CORI check; the mandatory disqualification of the Appellant given the nature of his prior conviction; and the procedure whereby the City of Newton Fire Department notified HRD of the decision to bypass Appellant. (Testimony).
20. The Appellant credibly testified in a forthright manner as to his prior criminal conviction and his employment since being released from the house of correction. (Testimony).

## CONCLUSION

In the context of reviewing a bypass decision by an Appointing Authority, the role of the Civil Service Commission is 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 Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when it is “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.” City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

Once the Appointing Authority’s burden is met, the Appellant may argue that the Appointing Authority’s actions were not justified by showing that the stated reasons of the Appointing Authority were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons. MacPhail v. Montague Police Department, 11 MCSR 308 (1998) *citing* Borelli v. MBTA, 1 MCSR 6 (1987). In the task of selecting public employees of skill and integrity, moreover, appointing authorities are invested with broad discretion. City of Cambridge at 304-5; Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660 (1971). This tribunal cannot “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” City of Cambridge. at 304. In light of these standards and the evidence in this case, the appeal must be denied.

It is the conclusion of the Commission that the City of Newton has met its burden of proving that there was a reasonable justification for bypassing the Appellant for the position of permanent firefighter. Specifically, the evidence proffered by the City is sufficiently reliable to warrant a reasonable mind to find that the Appellant was subject to a mandatory disqualification as a result of his prior conviction for trafficking cocaine in a school district.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness’ testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995). Here, the Commission finds that the testimony of all witnesses to be highly credible. Ms. Hamilton credibly testified as to

her CORI training, the uniform use of CORI by the City of Newton for all candidates for employment (including firefighters), the mandatory disqualification of Appellant given the nature of his prior conviction, and to the fact that only legitimate and relevant factors were considered in making the decision to bypass the Appellant. Similarly, Assistant Chief Proia credibly testified as to the City of Newton's hiring procedure, the receipt of a signed authorization from Appellant consenting to a background CORI check; the mandatory disqualification of Appellant given the nature of his prior conviction; and the procedure whereby the City of Newton Fire Department notified HRD of the decision to bypass the Appellant. The Appellant credibly testified in a forthright manner as to his prior criminal conviction and his employment since being released from the house of corrections.

Indeed, given the veracity of the testimony from all witnesses, it is evident, based on the Appellant's candid testimony with respect to his prior conviction (which concern was not similarly present with respect to the other, successful candidates), that the City's decision to bypass the Appellant was based upon adequate reasons, sufficiently supported by credible evidence. The Appellant failed to submit any objective, credible evidence to suggest that the bypass decision was a result of political considerations, favoritism or other bias. Further, a review of G.L. c. 6, s. 172 and the regulations promulgated by both the Criminal History Systems Board and the EOHHS clearly establish that the City of Newton was authorized to conduct a CORI background check on all firefighter candidates (including the Appellant) and to disqualify the Appellant given the nature of his conviction (trafficking cocaine in a school zone).

In sum, this case is a classic example of an Appointing Authority exercising its lawful discretion and choosing from among a group of candidates on the basis of legitimate and relevant factors. The Commission cannot substitute its judgment for that of the Appointing Authority in such a case.

For all of the above stated reasons, it is found that the City of Newton has established by a preponderance of reliable and credible evidence that it had just cause to

bypass the Appellant for the position of permanent firefighter. Therefore, the Appellant's appeal under Docket No. G1-04-326 is hereby *dismissed*.

Civil Service Commission

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John E. Taylor  
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Taylor, Guerin and Marquis; Commissioners) on January 25, 2007.

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to G.L. c. 31, s. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under G.L. c. 30A, s. 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:

Frank McGee, Esq.  
Donnalyn B. Lynch Kahn, Esq.