

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JOHN HINCHEY,
Appellant

v.

Case No.: G1-14-278

**SWAMPSCOTT FIRE
DEPARTMENT,**
Respondent

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No objections were received.

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

The decision of the Swampscott Fire Department to bypass Mr. Hinchey for appointment as a firefighter is affirmed and Mr. Hinchey's appeal under Docket No. G1-14-278 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell – Absent]) on September 18, 2015.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chairman

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:

Neil Rossman, Esq. (for Appellant)

Timothy Zessin, Esq. (for Respondent)

Edward B. McGrath, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

John Hinchey,

Appellant

v.

Docket Nos. **CS-15-50; G1-14-278** (Civil
Service Commission)

Town of Swampscott-Fire Dept.,

Respondent

Dated: June 1, 2 015

Appearance for Appellant:

Neil Rossman, Esq.

Rossman & Rossman

8 Essex Center Drive

Peabody, MA 01960

Appearance for Appointing Authority:

Timothy D. Zessin, Esq.

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Boston, MA 02110

Administrative Magistrate:

Sarah H. Luick, Esq.

Summary of Tentative Decision

The Town of Swampscott had reasonable cause to bypass John Hinchey for original appointment to the position of Fire Fighter based on a driving record which included two operating under the influence of alcohol (OUI) offenses. During the hiring process, the Appellant was still on probation for the May 2012 OUI offense. I recommend that the Civil Service Commission affirm the decision of the Town of Swampscott and dismiss the bypass appeal.

TENTATIVE DECISION

Pursuant to G.L. c. 30, § 2(b), the Appellant, John Hinchey, timely appealed to the Civil Service Commission (CSC), the decision of the Town of Swampscott bypassing him for an original appointment to the position of Fire Fighter. A pre-hearing conference was held before the CSC on December 16, 2014. A hearing was held February 13, 2015, at the offices of the

Division of Administrative Law Appeals (DALA) at One Congress Street, 11th Floor, Boston, MA 02114.

At the DALA hearing, various documents were admitted into evidence. (Exs. 1 – 12.) The hearing was digitally recorded, and both parties received a copy of the recording. The Appointing Authority presented the testimony of Swampscott Fire Chief Kevin Breen and Swampscott Police Detective/ Sergeant Thomas Delano. Mr. Hinchey testified on his own behalf. Both parties filed post-hearing briefs by April 24, 2015. (Exs. A & B.) The Petitioner filed a transcript of the digital recording of the hearing by Court Transcriber, Paula Pietrelia. (Ex. C, for identification only)

FINDINGS OF FACT

Based on the documents entered into evidence, the testimony presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. John Hinchey, born in 1977, is a life-long Swampscott resident. After graduating from Swampscott High School in 1995, he worked as a broker's assistant at A.G. Edwards in Boston. He completed a two year college degree program in criminal justice, and then fulfilled his goal of enlisting in the U.S. Army in 2000, serving until his honorable discharge in March 2007. (Exs. 4, 5 & 6. Testimony of Hinchey.)

2. Mr. Hinchey's military experiences included training as an infantryman and in parachuting. He earned an infantryman's badge. He served two year-long deployments in Iraq from 2003-2004 and 2005-2006, returning to Fort Campbell, Kentucky before and after his deployments. He reached the rank of Sergeant E-6. He experienced combat duty in Iraq. On his first deployment, he served on multiple convoy missions and patrols, and worked with Special Forces participating in raids and securing compounds. He was a squad leader of eight other

soldiers. During his second deployment, he again was a squad leader of eight, in charge of \$1 million in equipment including two Humvees, night vision devices on vehicles and that soldiers used, assault rifles and 50 caliber machine guns, vests, and ammunition. Although no one in his squads was killed, Mr. Hinchey lost some friends in combat. Upon his honorable discharge, Mr. Hinchey was diagnosed by the Veteran's Administration with a service connected disability rating for Post-Traumatic Stress Disorder (PTSD). He has been treating since his return home with the Veteran's Administration for his PTSD including twice a month visits with a therapist and attending PTSD groups. Among his symptoms, he can become uncomfortable from loud noises and crowds. He also returned from service with erratic driving habits at times. While in Iraq, the vehicles would be driven away from the sides of a road to avoid bombs. Once home, he found he had this tendency while driving. (Ex. 5. Testimony of Hinchey.)

3. Once home from his military experience, Mr. Hinchey worked as a Correction Officer for the Essex County Sheriff's Department between June 2007 and September 2010. He left the position because he did not like "the politics of the job." He was responsible for the care, custody, control and security of inmates and the facility. (Ex. 4. Testimony of Hinchey.)

4. After leaving his Correction Officer job, Mr. Hinchey enrolled in September 2010 in the North Bennett Street School in Boston, to study carpentry. He graduated in June 2011. Thereafter, he did carpentry work for construction companies including the Blue Fish Property Group between September 2011 and November 2012, and with Viking Construction since October 2013. (Ex. 4. Testimony of Hinchey.)

5. Mr. Hinchey was about nineteen years old when he was arrested for

OUI/alcohol when he was not yet in the military. He had been driving a friend home when the police pulled him over. He smelled of alcohol, and failed a breathalyzer test. He pled guilty to sufficient facts, and continuance without a finding was dismissed after completion of an alcohol program, Community Alcohol Safety Program (CASP). Mr. Hinchey again faced another OUI/alcohol charge upon his return from military service. On Memorial Day weekend, May 2007, he joined friends to golf and drink beers. On his way home he was driving in a center lane with another motor vehicle in the left lane. After the other motor vehicle turned into his center lane, he hit that vehicle from behind. Neither he nor the driver, nor that driver's passenger were hurt. The State Police arrived. Mr. Hinchey smelled of alcohol, took a sobriety field test, but refused to take a breathalyzer test. The refusal led to an automatic suspension of Mr. Hinchey's license and he was charged with OUI/alcohol. Mr. Hinchey pled guilty and was sentenced to probation until May 2015. His probation terms included attendance in an alcohol program and having an interlock device installed on his motor vehicle. While on probation, Mr. Hinchey was offered a job as an overseas military contractor. In order to take the job, he accepted an extension of the term of his probation by six months. He later turned down the job offer. (Ex. 6. Testimony of Hinchey.)

6. Kevin Breen has been a Swampscott Fire Fighter since 1976. He served as a Lieutenant, Captain and Deputy Chief with Swampscott before becoming Chief in November 2010. There are twenty-four Fire Fighters, four Lieutenants, four Captains, and one Deputy Chief. By the end of August 2014, three Fire Fighters were retiring. Then, a short time later, a fourth Fire Fighter retired. This left him with four vacant Fire Fighter positions to fill. He received from the Commonwealth's Human Resources Division a certified list of nine persons who had passed the Fire Fighter civil service examination who had indicated their

willingness to accept a position as a Swampscott Fire Fighter. All nine were given a date to come to the Swampscott Fire Station to pick-up an application packet and to attend a brief meeting to describe the hiring process. In addition, those appearing were given a drug test. Mr. Hinchey was included in this list of nine and also had disabled veteran status. Two of the nine candidates failed to appear at the meeting at the fire station, and one candidate failed the drug test. Mr. Hinchey and the five other remaining candidates passed the drug test. Mr. Hinchey now ranked first among the six candidates. The candidates were given the application packet to complete at home. Once that was done, they were told to attend a panel interview concerning their candidacy. The interview panels were scheduled two a day over three days. The panel participants were Chief Breen and three Swampscott Fire Captains. Among them they had about 100 years of fire service experience. (Exs. 3, 7, 8, 9, 10 & 11. Testimony of Breen.)

7. The application for original appointment to become a Swampscott Fire Fighter did not ask the candidates for their driving records or criminal records, but asked for their education, work histories, residences, personal references and military service history. The application asked for motor vehicle license information and whether the candidate possessed “any license to operate heavy equipment, hydraulic equipment or any license pertinent to the fire service.” The application also included an essay section containing the following instruction:

Please Take Some Time to tell anything about yourself. Feel Free to expand on information that we received on your questionnaire, but also tell us about your hobbies, activities, experiences, that will help us better understand who you are.

Another essay section asked:

What would you consider your 3 strongest attributes that make you an ideal candidate for the Swampscott Fire Department?

Another essay section asked:

What do you think your most recent employer, former or current, would tell us were your strongest and weakest attributes?

(Ex. 4.)

8. In response to the question on military service history, Mr.

Hinchey wrote:

I served from 2000-2007 as a team leader, then as a squad leader. I was responsible for 9 men and \$1 million worth of equipment. I completed two tours of duty in Iraq. I worked with U.S. and Iraqi military and civilian police. I maintained responsibility for training and supervision of soldiers for deployments.

Mr. Hinchey listed having a Massachusetts class D driver's license. In his essay section on providing any other information about himself including hobbies and activities to allow for a better understanding of who he is, Mr. Hinchey did not mention having twice faced OUI criminal charges, nor that he left his military service with PTSD that had effected his driving. The application did not ask if there was any disability resulting from military service. He mentioned being a life-long Swampscott resident, and that he enjoyed exercising such as running and golfing. He mentioned his goal to join the Army, and that he had some of the greatest experiences of his life in the Army, including parachuting from planes, rappelling down mountains, shooting missiles and firearms, and leading soldiers in combat. He noted that the Army allowed him to train and lead soldiers in very dangerous circumstances, choosing as a leader whether to put their safety before his own. Mr. Hinchey also noted that he lost friends in combat and experienced difficult combat situations. Since ending his military service, Mr. Hinchey wrote that he has been looking for a job that would provide him with the kind of camaraderie that he had in the service. Mr. Hinchey explained that he took a job with the Essex County Sheriff's Department as a Correction Officer where he made friends, but left because the

position involved politics. He explained that he always liked to work with his hands so he studied carpentry at North Bennett Street School which he found to be a great experience, and that led to carpentry work employment he has done for about four years. Yet, he found this work lacked the camaraderie he still wanted in a job. He wrote that he decided to seek the Swampscott Fire Fighter position as a good fit for his needs and talents. In terms of his strongest attributes for the job of Fire Fighter, Mr. Hinchey wrote that he is a very loyal person to his friends and family, and that he would treat the Fire Department as another family. He wrote that he has a sense of duty where no job is too big or too insignificant to do well. He noted how he advanced within his military unit from doing small tasks under the command of younger people, yet always showed them great respect. He mentioned that he will show that respect as a Fire Fighter within his chain of command and within the community. In terms of the essay question on his strong and his weak attributes in a work setting, Mr. Hinchey wrote that he arrives at work on-time and ready to start his carpentry tasks with Viking Construction. He wrote that he always works to the best of his ability, and has the people skills to control a worksite of employees or to deal with a homeowner as needed. He listed his weakness as being a perfectionist which may take him more time to avoid any mistakes in his tasks, and that he sometimes loses himself in his work. (Ex. 4.)

9. Once the candidates turned in their application packets, interviews were the next step and were intended to be conversational rather than being a test. The panelists wanted to get to know each candidate in order to determine if the candidate would be a good fit for the Fire Department and its culture. To Chief Breen, this included determining whether the candidate viewed the job as a primary career or as a second job because of the concentrated work schedule the Fire Fighters have to permit working another job. The panelists had the candidates'

applications to review during the interviews. The questions were compiled from previous interview questions and from the captains' internet searches. The candidates were not asked the same questions, and the panelists were able to ask follow-up questions. The questions were divided among the panelists, and the interviews lasted between forty-five and sixty minutes. The questions that the panelists used included the following:

- Describe the work of a Fire Fighter, including a typical day.
- Have you done your best in your current job.
- How do you handle pressure or stress.
- Will you continue your current job part-time.
- Where do you see yourself in five and ten years.
- What is the most appealing aspect of being a Fire Fighter.
- What is your strongest and your weakest asset.
- What type of person do you find difficult to work with.
- Do you have hobbies or interests outside of work.
- What made you want to be a Fire Fighter and do you feel qualified.
- Have you done any preparation work to be a Fire Fighter.
- What skills do you bring to the job.
- What do you know about the community where you will be working.
- What are the most important attributes for being a good Fire Fighter.
- Do you have any problem with the use of drugs or alcohol.

Besides these kinds of questions, the interview panelists also asked the candidates hypothetical questions such as:

- How would you handle a conflict with another employee or a situation involving sexual harassment or racism.
- How would you address conflicting orders received at an emergency.
- How would you handle an order placing you in great danger or that you feel is morally wrong.
- How do you respond to a question you do not have an answer to.
- How would you learn from the resolution of conflicts with a co-worker or supervisor, including if you would act differently when facing such a conflict again.

Although score sheets were available for the panelists to use on each candidate, this was not routinely done because it was not a requirement for a panelist. (Exs. 7 & 12. Testimony of Breen.)

10. Mr. Hinchey had his interview on October 6, 2014. He was asked about his military service and about his work history, including his work as a Correction Officer. He was asked what he liked about being a Fire Fighter and what he understood the work involved. He was asked some of the same kinds of questions that all the candidates were asked as well as questions about what he listed in his application. The panelists did not do extensive probing into what the candidates said or listed in their applications. They did not probe into Mr. Hinchey's military experiences too deeply. At the end of the interview each candidate was asked a general question, whether the background check on the driving and criminal records would give the panelists cause for concern. Mr. Hinchey told them that he had two OUI/alcohol criminal charges on his record. He explained that the first one was when he was quite young and the second one was once he had returned from military service. He explained that both involved terms of probation with alcohol programs. Mr. Hinchey told the panelists that he was still under terms of probation concerning the second OUI, including for an extended time period because he had sought a job overseas. He explained that operated a motor vehicle with an interlock device. The panel asked Mr. Hinchey if he had an alcohol problem and he replied that he did not. (Ex. 7. Testimony of Breen & Hinchey.)

11. The panelists discussed each candidate after the interview. Mr. Hinchey presented the only red flags/concerns, but the panelists allowed his application to proceed to the background checks and the personal and work reference checks stage. The panelists concluded that Mr. Hinchey had interviewed just as strongly as the other five candidates had. The background checks were done by Swampscott Sergeant Detective Thomas Delano. The personal and work reference checks were done among the Captains who served on the panel, and their checks did not result in any red flag situations for any of the candidates, including Mr. Hinchey.

The background checks involved the same database checks that are done for Police Officer candidates, including driving records and criminal records. (Ex. 6. Testimony of Breen & Delano.)

12. Detective Delano had signed permission forms from the candidates to gain information off the databases. He did not have the candidates' applications. He retrieved information off the databases. He did all these checks in one day and produced reports on his findings for each candidate. He spoke with Chief Breen to explain how to read the reports of database information such as what abbreviations meant. Detective Delano has been a Swampscott Police Officer for twenty-four years, sixteen as a detective. He did national database background checks on each of the six candidates. He uncovered each candidate's driving record. He ran his checks on October 14, 2014. Detective Delano uncovered Mr. Hinchey's two OUI/alcohol criminal matters, including how each was resolved. He was able to check the Board of Probation (BOP) records about these charges. He uncovered a criminal charge on another candidate when the candidate was a juvenile; for transporting alcohol. He uncovered no adult criminal matters for other than Mr. Hinchey and the two OUI/alcohol crimes.¹ (Exs. 6, 8, 9, 10 & 11. Testimony of Delano.)

13. Detective Delano found that Mr. Hinchey was arrested on May 28, 2012 for OUI/alcohol, had his license suspended, was arraigned on May 31, 2012, and pled guilty to the charge. He received probation that involved completing an alcohol program. The term of probation was until May 2015 (but was later extended to November 2015 so Mr. Hinchey could

¹ I was provided with the background check documents for each of the four candidates who were conditionally appointed from the hiring process, along with their applications and some of the scoring sheets used on each during the interview process. I assigned letters to represent these four candidates besides Mr. Hinchey. None of the details surrounding the driving citations of Candidates A-D were presented at the hearing or are found in the candidates' application or on their interview scoring sheets. (Ex. 8, Candidate A; Ex. 9, Candidate B; Ex. 10, Candidate C; and, Ex. 11, Candidate D.)

suspend his probation while temporarily working overseas). The OUI incident also involved a surchargeable accident. He found that Mr. Hinchey was arrested and arraigned for OUI/alcohol in June 1997, had his license suspended, and that his criminal case was continued without a finding until March 1998 when it was dismissed after Mr. Hinchey had completed an alcohol program. In addition, Detective Delano found that Mr. Hinchey had a driving record that included a November 2007 lack of inspection sticker he was found responsible for, and a speeding violation that was nolle prossed. He found another speeding violation in September 2010 he was found not responsible for. After the arrest and arraignment for the OUI/alcohol in 2012, Detective Delano found Mr. Hinchey had a March 2014 seat belt violation he was responsible for, and a failure to stop violation that was nolle prossed. (Ex. 6. Testimony of Delano & Hinchey.)

14. Candidate A, born in 1980, had a driving record of citations that Detective Delano found from the database search. In July 2004, Candidate A was cited for improper equipment for which he was not responsible. In October 2007, he was found responsible for unregistered/improper equipment. In December 2007, he had a surchargeable accident. In January 2008, he faced a speeding citation in New Hampshire. In January 2009, he was cited and found responsible for no inspection sticker and was cited for a display of number plate.² In May 2009, he was found responsible for a seat belt violation and his citation for a left turn exclusion was nolle prossed. (Ex. 8. Testimony of Delano.)

15. Candidate B, born in 1989 (estimated based on his application information that he is a 2007 high school graduate and a resident of Swampscott his whole life from

² There was no disposition listed after the out of state ("NH") speeding citation. Detective Delano was asked what the "NA" meant after this number plate citation, and he did not know. (Ex. 8.)

1989), had a driving record that Detective Delano found of one incident from June 22, 2006 where he was cited for transporting liquor as a minor. (Ex. 9.)

16. Candidate C, had a driving record that Detective Delano found of one incident from July 19, 2013 of “RMV/FED Safety Regs Lynn” he was held responsible for. This was not a criminal charge. (Ex. 10. Testimony of Delano.)

17. Candidate D, had a driving record that Detective Delano found containing several citations. From August 2000, he had a speeding citation that was nolle prossed, and a surchargeable accident from January 2002. He had citations for a seat belt and no inspection sticker from September 2004, and was responsible for the seat belt violation. The inspection sticker violation was nolle prossed. Candidate D had another speeding citation in August 2006 he was responsible for, and a speeding citation in September 2009 he was not responsible for. He had a June 2011 surchargeable accident along with some citations: “on the turnpike, flashing signal, and possibly using the median to turn around, stop and turning,” for which he was not responsible; and, a “traffic/safety” violation for which he was not responsible. In December 2011 and in January 2012, Candidate D had a hearing on three surchargeable events. Detective Delano explained that if you do not pay on these surchargeable events you are found responsible for, then you have your license suspended.³ (Ex. 11. Testimony of Delano.)

18. Candidate A provided background information in response to the essay questions in the application. He grew-up in New Hampshire with his sister in a “blue-collar family” where both parents worked hard. Candidate A helped-out with his father’s landscape business from an early age that included “hard work and putting in very long

³ Detective Delano was not asked and did not volunteer whether his database results revealed whether or not Candidate D paid any charges to avoid having a suspended license.

days.” He learned how to act with “discipline and a strong work ethic” because he started working as “the low man on the totem pole.” He had a “passion for athletics,” and experienced “a variety of sports,” including “competitive equestrian” events. He was successful at basketball which “taught me discipline.” He was “team captain for two years in college and learned to be a “role model” for younger players. As captain, he learned “leadership skills and how to make a team successfully work together.” He traveled in Europe after college playing basketball.

Besides working for his father’s business, Candidate A worked from October 2006 as a chimney sweep for the Boxford Chimney Sweep Company. From January 2006 to September 2008, he worked as a “psych tech” supervising psychiatric patients at a hospital. He graduated from college with a bachelor’s degree in criminal justice. He has no military service record. In addressing his strongest attributes for being a Fire Fighter, Candidate A, a current Swampscott resident, wrote in his application that he would be sure to maintain his fitness level because a Fire Fighter has to “be properly equipped, skilled at what they do, and fit for the demands of their job.” He mentioned his integrity as a virtue; “being honest and having strong moral principles ... doing the right thing even when no one is looking.” He explained that being part of the Swampscott Fire Department would mean his “fellow firefighters will need to rely on my word and my actions ... I will follow through,” and be a trusted professional. He wrote that he would be a Fire Fighter who represents “the community,” including being a role model for children. Candidate A also felt he would “work well on a team ... sacrifice myself in order for my teammates to succeed.” He wrote of the importance that “to work well and thrive on a team is a quality” he felt he could offer as a Fire Fighter. Candidate A also wrote that he currently works for a small company that installs “close to two thousand chimney liners a year,” and that he is in charge of “a two to three man crew” with tasks that involve “both physical and mental

thoughness.” Candidate A wrote in his application that in over ten years of work, he has never called in sick and works the hours it takes to finish a task. He mentioned the importance of “planning ahead and communication” to “stay efficient.” He acknowledged that he should “be more assertive when in command,” and always be a good leader versus merely supervising team members. Candidate A has no military service. (Ex. 8.)

19. Candidate B wrote in the essay parts of his application that he was born and raised in Swampscott, and attended Swampscott public schools. He has attended Curry College and Salem State University, taking courses in criminal justice and political science. He has been working full time for his family’s construction business, beginning at age seventeen. He works alongside his father and his brother. He enjoys the outdoors and sports including running, swimming and the team sports of basketball and hockey that he plays with friends. He enjoys spending time with his family and friends. He has a Massachusetts Class A driver’s license and a hoisting engineer license “restricted to 2A-Excavators.” He has no military service. Candidate B wrote in his application that his strongest attribute as a Swampscott Fire Fighter would be his personal integrity. He wrote that he conducts himself truthfully and professionally. He is reliable, responsible and honorable in his work and conduct. He believes these traits will help him do well as a Fire Fighter. He appreciates that a member of the public facing an emergency wants the Fire Fighter to make him feel comfortable, and will be someone who can be trusted, and someone who will offer help and protection from harm, including protecting property. Candidate B feels he is a good “team player” who can work with others to achieve a common goal as part of a “cohesive unit.” He feels he has good self-discipline and can “focus on continuously staying motivated and patient even during the most stressful times.” He wrote in his application that he believes his employers would find him hardworking and trustworthy, and

someone who completes the assigned task. He believes he has a good record of “looking out for the safety of others while working.” In terms of a weakness, Candidate B wrote that he may do too much of a work task by himself, but with more experience on the job, he is now able to effectively delegate more work tasks as he emphasizes teamwork. (Ex. 9.)

20. Candidate C wrote in the essay portion of his application that he has been a life-long Swampscott resident. After graduating from Swampscott High School, he attended some college. From May 2006-May 2010, he served in the U.S. Air Force, stationed at Hanscom Air Force Base as a military police officer. He had an eight-month deployment to Iraq flying surveillance drones. Upon his honorable discharge, he held the rank of Senior Airman (E-4). He holds a Massachusetts Class D driver’s license. While attending the Swampscott public schools, he played hockey, baseball and football. He enlisted in the U.S. Air Force about a year after his high school graduation. Once back home, he wanted to become a Swampscott Fire Fighter. In the four years since he left military service, Candidate C has been a Salem Police Department Dispatcher between April 2011 and September 2012, worked in landscaping as a pesticide applicator from May 2013 to November 2013, and worked in construction as a project manager from December 2013 to the present. He was a “UAV Operator” for “TASM” in September 2012 operating a surveillance drone, but he left this job because he would have needed to work in Afghanistan. He has also been volunteering his time since he came home from military service, coaching Swampscott Middle School hockey and softball. Candidate D wrote in his application concerning his strongest attributes for being a successful Swampscott Fire Fighter, that he is a team player, a hard worker, and loyal. He explained that being on sports teams from an early age taught him the worth of being a team player and having the team excel. He has always taken pride in being a hard worker, including

starting work at age thirteen “scooping ice cream” with work done ever since then. He noted how his military service “taught me ... hard work pays off. Pushing yourself to limits you didn’t think you could reach.” He explained that his family taught him the importance of loyalty from an early age. In terms of work skills, he wrote that he is a “fast learner, being a hands on person, ... able to multi-task and ... able to lead and also follow.” He wrote that a weakness would be “the amount of pressure I put on myself” to work hard on the task at hand. (Ex. 10.)

21. Candidate D wrote in his application that he grew up in Swampscott and attended the Swampscott public schools. He graduated from high school in 2002. He attended the University of Hartford gaining a bachelor’s degree in criminal justice and sociology. He has no military service. He holds a Massachusetts driver’s license. He is trained in self-contained underwater breathing apparatus (SCUBA), operates plow trucks and bobcats, and is taking classes at Wentworth Institute of Technology toward securing a journeyman’s electrician license. He is a Correction Officer with the Suffolk County Sheriff’s Department from May 2007. He has experience working for a construction company as a carpenter (May 2006-May 2007), and in customer service food preparation work for Aramack while in college (January 2003-May 2004). He has also worked for Dunkin Donuts doing customer service, for the Town of Swampscott’s Department of Public Works during the summers of 2004 and 2005, and was a camp counselor during the summers of 1999-2002. Candidate D played Swampscott Little League baseball and youth hockey. He grew up feeling a part of the Swampscott community, and learned the importance of a strong work ethic. He and his father volunteered to help build an outdoor ice rink in Swampscott and felt pride in what they had done to meet their community’s needs. He was in the cub scouts and boy scouts which helped build character. He enjoyed the outdoors

growing up. He learned the importance of helping others which he knows is what makes him “passionate” about becoming a Swampscott Fire Fighter. He recalled doing fundraising events for needy persons, helping out at nursing homes, and volunteering with his mother at a local church food pantry. He wrote in his application that he has always set personal goals, and worked at Dunkin Donuts to be able to purchase his own car. In high school he played varsity hockey each year, and learned lacrosse. He became the team captain his senior year. He received awards in these sports in high school “for my dedication, leadership and spirit.” He wrote that he also enjoys snow-boarding, bicycle riding, deep sea fishing with friends, and fixing cars. Candidate D noted that he was reliable and punctual when he worked for the Department of Public Works summers in high school, and proud to be part of a workforce. He wrote that this is when he began considering setting his sights on becoming a Fire Fighter. “I loved living and working in a small town but what I loved more was that people called you when they were in need of help. The job [of Fire Fighter] is filled with risk but the reward is never ending and the bonds last forever.” Candidate D noted that he routinely donates blood and is a member of the bone marrow registry. In 2010 when the high school lacrosse team had no coach he volunteered his time to fill this role. He began taking courses toward becoming an electrician as a second job to being a Fire Fighter. Candidate D wrote about the attributes he has to bring to being a Fire Fighter. He noted his “willingness to accept responsibility and [his] professionalism on and off duty.” His experience as a Correction Officer was discussed as involving “physically and mentally rigorous training” at an academy for twelve weeks where he learned the importance of following rules and regulations with their “code of conduct, ethics” and rules involving “sexual harassment, diversity and interpersonal communication” on the job. He has EMT training and has maintained his certification. From working with inmates and prison staff, he has learned

“how big a role ... [diversity] plays in everyday life ... with a multitude of ethnic backgrounds, religious backgrounds and gender issues that arise.” As a Correction Officer, Candidate D explained in his application that he must plan his day to be “beneficial to the department and is time efficient.” He noted how security issues arise on a regular basis so that he has learned the importance of prioritizing tasks. He feels he has initiative and needs “minimal supervisory oversight.” He keeps a neat and clean appearance because he is a public servant. He noted that he writes “reports [that] are always clear, concise and detailed.” He wrote in his application that his current employer would find him to be dedicated, reliable and a problem solver, able “to think on his feet.” He can be counted on for quick and effective action as needed during emergencies. He wrote that a weaker attribute is that he sets very high expectations for himself, tackling many tasks at one time, and that he is learning always to prioritize tasks. He noted that his employer has asked him to get further training by participating on the Sheriff’s Emergency Response Team to address all emergencies at the prison, and to become proficient at “forced cell extraction” of inmates when there are serious threats to safety. (Ex. 11.)

22. Once the background checks on the six candidates were finished and submitted by Detective Delano, Chief Breen and the three Captains discussed each of the candidates. There was a consensus that all were on equal footing in terms of all the criteria, except for Mr. Hinchey having an adult criminal record. The Panel decided not to re-interview Mr. Hinchey. Chief Breen decided that Mr. Hinchey’s two OUIs, the on-going probation and the driving record were sufficient reasons for a bypass. The other panelists agreed. Chief Breen provided this recommendation to the Town Administrator. This recommendation was then made to the Board of Selectmen, who agreed that Mr. Hinchey should be bypassed for appointment for these reasons. Mr. Hinchey was not offered any opportunity to address either the Town

Administrator or the Board of Selectmen about the OUIs, particularly the 2012 OUI and the ongoing probation time period. There was no discussion about determining whether Mr. Hinchey could secure a hardship license from the Registry of Motor Vehicles with the Probation Department's approval, in order to reinstate his license so that he could work as a Fire Fighter. (Testimony of Breen & Hinchey.)

23. Before sending out the formal letter of bypass, Chief Breen wrote Mr. Hinchey an email on November 17, 2014, explaining that he would be bypassed for appointment. Chief Breen explained that he would be able to appeal this determination to the Civil Service Commission. Mr. Hinchey was sent a formal letter of bypass dated November 19, 2014 by Chief Breen on behalf of the Board of Selectmen. He was provided with details on how to appeal the bypass decision. The reasons listed for the bypass were:

[B]y-pass because of information gathered during your background check specifically your driving record. Noted in your driving record are many incidents, some of which I acknowledge were dismissed, but many others were not. One of the primary reasons for my recommendation is the DWI [OUI] Incident for which it is my understanding that you are still on probation to complete the required programs.

(Ex. 1.) Mr. Hinchey filed a timely appeal of the bypass decision with the Civil Service Commission. (Ex. 2.)

Conclusion and Recommendation

I conclude that the hiring process involved a proper and fair evaluation of each of the six job candidates for appointment to the job of Swampscott Fire Fighter. No evidence demonstrated that Mr. Hinchey was in any way misled or treated unfairly, or evaluated differently from the other candidates during any stage in the hiring process. I conclude the evaluation process employed was useful for its legitimate intended purpose, and that the

application and interview process allowed the panelists in the hiring process to get to know the six candidates in terms of their backgrounds, skills, and their characters; matters of importance to the Fire Department and Town government. From the findings made, all six got through this much of the hiring process.

I conclude that the Appointing Authority had a justifiable reason, based on sufficient and correct criminal background information, to bypass Mr. Hinchey. I conclude that if any of the other candidates possessed the same OUI record that Mr. Hinchey has, that they also would not have been appointed; that it was Mr. Hinchey's criminal driving record, the two OUIs, particularly the 2012 OUI with the on-going probation term, that explains why he was bypassed and no other reason. Although the Appointing Authority through Chief Breen in the bypass letter also noted Mr. Hinchey's driving record of citations, I conclude that part of his record without consideration of the OUIs would not have led to his bypass. The Appointing Authority, through Chief Breen's evaluation, never concluded that Mr. Hinchey has an alcohol problem as the real reason for his bypass, regardless of the OUIs. None of the evidence presented demonstrated that as the real reason behind the bypass. Mr. Hinchey's argument that he would have qualified for a waiver in order to operate Fire Department apparatus while his probation term continued, is speculative. Also, I found credible Chief Breen's explanation that Mr. Hinchey's guilty pleas, regardless of the availability of a waiver, was the reason for the bypass. That was just one additional supportive factor; the other factor was his ongoing probation term from the 2012 OUI offense.

Mr. Hinchey failed to address the two OUIs within his application, including how how he complied with the terms of his probation. On the other hand, the application never asked the applicant to reveal any criminal history or even a driving record. At the interview, the record

shows that Mr. Hinchey provided some background concerning the 2012 OUI and its attendant probation term, but the panelists did not probe further. Also, Detective Delano's background checks did not include interviews to shed light on the information uncovered. Nevertheless, Mr. Hinchey's testimony at the DALA hearing about the circumstances of the two OUIs and the influence of PTSD on his driving, do not demonstrate that he would have avoided the bypass had he been able to supply all that information to the panelists, Chief Breen, or to the Board of Selectmen. Not being given a specific opportunity to tell this information did not cause a flawed hiring process. This lack of giving Mr. Hinchey the additional chance to address the two OUIs does not show that the panelists were not sufficiently capable of evaluating candidates, or that the Board of Selectmen permitted and relied upon a flawed hiring process. I conclude Mr. Hinchey had the opportunity to address with mitigating information anything about himself in his essay portion of his application or in his interview session with the panelists that he knew would be a negative factor.

G.L. c. 31, § 1 defines basic merit principles in pertinent part as follows:

(a) recruiting, selecting ... employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

When an Appointing Authority bypasses an otherwise eligible candidate it must provide both a reasonable justification for doing so, as well as proof that such a justification could be applied fairly to all candidates. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241 (2001); *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). In hearing

bypass appeals, the Civil Service Commission must determine whether the Appointing Authority has “sustained its burden of proof that there was reasonable justification for the action taken.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304. Reasonable justification requires that the Appointing Authority based its actions on adequate reasons, supported by creditable evidence, guided by common sense, and weighed by an unprejudiced mind. *See Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 189, 190-91 (2010); *Civil Service Commission v. Municipal Court of Boston*, 359 Mass. 214 (1971); *Wakefield v. First District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928). In sustaining its burden of proof, the Appointing Authority must prove its justification by a preponderance of the evidence. G.L. c. 31, § 2(b). As noted by Mr. Hinchey in his brief in citing *Boston Police Department v. Kavaleski*, 463 Mass. 680, 688 (2012) that cites *Massachusetts Association of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256259 (2001), “[t]he commission’s primary concern is to ensure that the appointing authority’s action comports with ‘basic merit principles,’ as defined in G.L. c. 31, § 1.”

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission cannot substitute its views and preferences for those of the Appointing Authority. The Civil Service Commission’s role is to “protect against overtones of political control ... and assure neutrally applied public policy.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 303. So long as the Appointing Authority provides a sound and sufficient reason for the bypass and applies its policies equally, the Civil Service Commission should not intervene.

For these reasons, I conclude the Civil Service Commission should affirm the Appointing Authority's decision to bypass Mr. Hinchey.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Sarah H. Luick, Esq.
Administrative Magistrate

Dated: June 1, 2015