

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
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**IN RE: HOLYOKE RESIDENCY
INVESTIGATION**

CSC Tracking No. I-19-137

Appearance for City of Holyoke:

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Appearance for Firefighter S and
Local 1683 IAAF :

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Commissioner:

Paul M. Stein

FINDINGS AND CONCLUSION OF INVESTIGATION

Summary

A Civil Service Commission (Commission) investigation, conducted pursuant to G.L. c. 31, §§ 2(a) and 72, showed that a Holyoke firefighter, who resided in Easthampton during the qualifying period, was erroneously granted a residency preference in the City of Holyoke which resulted in his invalid appointment as a Holyoke firefighter in 2017. This invalid appointment harmed at least one other applicant who qualified for the residency preference in Holyoke, a community with a large minority population whose Fire Department remains under a court-ordered consent decree until it achieves parity in hiring. To address this invalid appointment, and to rectify the harm done to another candidate, the Commission is issuing appropriate remedial orders pursuant to its authority under civil service law and Chapter 310 of the Acts of 1993.

Background

On December 19, 2019, as result of information provided to the Civil Service Commission (Commission) in Bacon v. City of Holyoke, 32 MCSR 219 (2019) [*Bacon*], and after a show cause conference held on December 11, 2019, the Commission voted 5-0 to initiate this investigation pursuant to G.L.c.31, § 2(a) and § 72. The purpose of the investigation was to inquire whether there had been a violation of the civil service law and rules related to residency regarding the appointment

of a certain Firefighter (Firefighter S) to a permanent, full-time position in the Holyoke Fire Department (HFD). Specifically, the Commission reviewed whether or not Firefighter S, as required by the statute and as he had represented to the state's Human Resources Division (HRD), had resided continuously in Holyoke for the one-year period preceding the April 2016 civil service examination so as to be entitled to claim a statutory residency preference on the Certification from which candidates who passed that examination were appointed. Without such residency preference, Firefighter S would not have been ranked high enough on the eligible list for consideration for appointment, his selection would be unlawful and the appointment would have deprived another candidate who was a bona fide Holyoke resident from appointment.

On June 24, 2020, the Commission conducted a remote video investigative conference (via Webex). Holyoke and Firefighter S appeared and were represented by Counsel. Eleven (11) Exhibits were introduced into evidence, testimony was received from the HFD Fire Chief, two HFD Fire Lieutenants and Firefighter S. The Commission also requested and received copies of additional documents from HRD concerning Firefighter S, and Certifications 04142 and 03147, issued to Holyoke and the City of Easthampton, respectively.

Based on the evidence received, on November 19, 2020, the Commission issued "Interim Findings and Conclusion of Investigation", which ordered Holyoke to further address the "red flags" identified by the Commission that tended to infer that Firefighter S did not reside in Holyoke for a full year prior to taking the April 2016 Firefighter Examination. In particular, the record before the Commission at the time established that:

- Firefighter S grew up in Easthampton. He represented that he moved from Easthampton in October 2014 to live with an acquaintance who was an HFD Firefighter (Firefighter D), who, according to Firefighter S, provided Firefighter S a room in his house. However, Firefighter D did not return the "Tenant Verification Form" that he was requested to submit to the HFD to verify the landlord-tenant relationship.

- Firefighter D did provide a personal reference for Firefighter S which did not mention any landlord-tenant relationship. Firefighter S did not call Firefighter D to testify at the investigative conference.
- Firefighter S testified that he moved from Easthampton in 2014, where he lived with his girlfriend, after they agreed to separate. He hoped they would reconcile and expected the separation would be temporary.
- Firefighter S renewed his Massachusetts Driver's License in December 2014 using his Easthampton address.
- Firefighter S's name was listed as an Easthampton resident on Certification 03047 dated 8/14/2015 issued to the Town of Easthampton for appointment of Firefighter/EMTs to the Easthampton Fire Department but was not hired.
- On his application to the HFD in December 2016, Firefighter S stated that he had applied to become an Easthampton firefighter in November 2014. He did not mention any application in 2015. HRD issued no certification to Easthampton for appointment of firefighters in 2014.
- Despite being given the opportunity to do so, Firefighter S produced none of the usual indicia that would show that he had relocated his residence from Easthampton to Holyoke: no voting records, insurance policies, motor vehicle registration, tax records, or other documents (e.g. – proof that he had paid rent to Firefighter D, as alleged) showing that he had resided in Holyoke during the statutorily required time period.
- Firefighter S's former girlfriend eventually married another person and moved out of the Easthampton home where they had lived together. Firefighter S purchased that property in July 2018.

In addition, the Commission investigation confirmed that the HFD remains a so-called "Consent Decree" appointing authority, which means that HRD is required to rank candidates in an order so that certain minority candidates were afforded an enhanced opportunity for appointment, as a remedial action for prior proof of discriminatory hiring practices. Based on the ordering of the candidates on Holyoke Certification 04142, the next candidate in line after Firefighter S was a bona fide Holyoke resident who would likely have been a minority candidate.

The Commission ordered Holyoke to provide, on or before December 19, 2020, additional indicia that confirmed Firefighter S's residence in 2014 through 2016 such as a Landlord Verification Form from Firefighter D, voting records, excise tax statements, motor vehicle registrations, insurance policies, bank statements and/or other mail addressed to him in Holyoke. The Commission also

ordered that Holyoke confirm that it has promulgated rules and procedures for future hiring cycles that will include specific requirements providing for heightened due diligence in the confirmation of a candidate's residency preference claim.

On December 19, 2020, Holyoke responded to the Commission's order with a two-page memorandum. Holyoke stated that it had complied with the Commission's order to ensure heightened scrutiny of a candidate's residency preference on a going forward basis. However, as to the production of additional indicia of Firefighter S's residency claim, Holyoke stated:

“The City of Holyoke requested this information from the Union but did not receive any additional information from the Union. The City of Holyoke has already provided all of the information in its possession to the Commission.”

Holyoke requested that, in view of its promise of prospective compliance with civil service rules requiring better scrutiny of residency preference claims, as well as staffing issues facing the HFD due to COVID-19, Firefighter S be allowed to continue in the HFD's employ.

On December 31, 2020, the Commission also received a “RESPONSE BY UNION AND FIREFIGHTER S TO INTERIM FINDINGS AND CONCLUSIONS OF INVESTIGATION.” The Union's response provided no new information to demonstrate the validity of Firefighter S's status to residency preference in Holyoke. The gravamen of the Union's response argues that the Commission investigation was an unnecessary excess of authority and that the Commission could draw no adverse inferences from the failure to call Firefighter D or to produce documents because that would put an unreasonable burden on Holyoke or Firefighter S to produce evidence.

In January 2021, the Commission filed public record requests to Holyoke and Easthampton, seeking copies of Firefighter S's voting records and excise tax records, if any, for the period 2014 through 2016. The response to those requests established that:

- Firefighter S was not registered to vote in Holyoke or Easthampton during the three year period from 2014 through 2016.

- Holyoke issued Firefighter S was no excise tax bills for any motor vehicles or boats registered to him with a Holyoke address
- Firefighter S received twelve excise tax bills for motor vehicle(s) registered to him with an Easthampton address, five issued in 2014, two issued in 2015, and four in 2016.

The Commission’s Statutory Authority

G.L.c.31, §2 states in relevant part:

In addition to its other powers and duties, the commission shall have the following powers and duties:

- (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.”

G.L.c.31, §72 states in part:

The commission or the administrator may investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services. The commission or the administrator may report the results of any such investigation to the governor or the general court.

The commission or administrator, upon the request of an appointing authority, shall inquire into the efficiency and conduct of any employee in a civil service position who was appointed by such appointing authority. The commission or the administrator may also conduct such an inquiry at any time without such request by an appointing authority. After conducting an inquiry pursuant to this paragraph, the commission or administrator may recommend to the appointing authority that such employee be removed or may make other appropriate recommendations.

G.L.c.31, §73, provides, in relevant part:

If, in the opinion of the administrator, a person is appointed or employed in a civil service position in violation of civil service law and rules, the commission or the administrator shall mail a written notice of such violation to such person and to the appointing authority. The commission or the administrator shall then file a written notice of such violation with . . .the officer whose duty it is to pay the salary or compensation of such person

The payment of any salary or compensation to such person shall cease at the expiration of one week after the filing of such written notice

The Commission also is authorized to “assess a fee upon the appointing authority when inappropriate action has occurred.” See, e.g., Acts of 2019, c. 41, §2, Line Item 1108-1011

Finally, Chapter 310 of the Acts of 1993, an emergency act entitled “An Act Providing For The Protection Or Restoration Of The Rights of Certain Public Employees”, provides:

“If the rights of any person acquired under the provisions of this chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of their own, the civil service commission ma 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.”

These statutes confer significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate and what remedies are in order when illegal or inappropriate action has occurred. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). See also Dennehy v. Civ. Serv. Comm’n, No. 2013-00540, Suffolk Superior Court (2014) (“The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.”). The Commission has consistently acted to protect the civil service rights of those who were prejudiced by systemic violations. See In Re: 2010/2011 Review and Selection of Firefighters in the City of Springfield, 24 MCSR 627 (2011) (Commission opened an investigation and ordered relief when it became known that the Deputy Fire Chief of the Springfield Fire Department had been involved in the hiring of a class of firefighters which involved the bypassing of certain more highly ranked candidates in favor of the Deputy Chief’s son) In Re: Town of Oxford’s 2011 Review and Selection of Permanent Intermittent Police Officer Officers, CSC No. I-11-280 (2011) (Commission took action after investigation of appointments made in Oxford in which the direct involvement of the appointing authority compromised a selection process which favored certain relatives of the appointing authorities); In Re: City of Methuen’s Review and Selection of Reserve Police Officer Candidates in the Fall of 2008, CSC No.I-09-290 (2010) (same).

Request by John Mograss, et al. to Investigate the Failure To Administer Civil Service Examinations the Public Safety Position of Captain at the Massachusetts Department of Correction, 28 MCSR 601 (2015) (Commission entertained a request for investigation by a group of Lieutenants and Captains of the Department of Correction, to determine why no examinations had been held since 1981 for promotion to the civil service position of Captain, which deprived them of the opportunity to obtain civil service permanency in this position)

The Residency Preference

Among the paramount “basic merit principles” which govern Massachusetts Civil Service law is the requirement for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment.” G.L.c.31, §1. The opportunity for consideration and selection of candidates based on their relative ranking on eligible lists after competitive examinations, based on examination scores and statutory preferences, is the core means by which this mission is accomplished. G.L.c.31, §26 & §27. Among the statutory preferences incorporated into the civil service law, residents of a civil service community are entitled to be considered for original appointment to public safety positions ahead of non-residents. G.L.c.31, §58, ¶3 provides:

“If any person who has resided in a city or town for one year immediately prior to the date of examination for appointment to the police force or fire force of said city or town has the same standing on the eligible list established as the result of such examination as another person who has not so resided in said city or town, the administrator, when certifying names to the appointing authority for the police force or fire force of said city or town, shall place the name of the person who has so resided ahead of the name of the person who has not so resided; provided, that upon written request of the appointing authority to the administrator, the administrator shall, when certifying names from said eligible list for original appointment to the police force or 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 any person who has not so resided.”¹

¹¹ Holyoke applies the proviso requiring preference of all residents over all non-residents.

This statutory preference for residents, along with the application of the so-called “2n+1” formula, which requires selection of candidates from the first “2n+1” names on a certification, means, when a candidate is erroneously placed on a certification as a resident, that error carries significant consequences for other qualified residents (or otherwise higher ranked non-residents) who, thereby would be excluded from consideration because the insertion of the candidate who was not entitled to claim residency bumps them out of consideration. Because of the serious consequence for candidates, e.g., Holyoke residents who did meet the statutory residency requirement (which in this case included at least one minority candidate) and who may have lost the opportunity for appointment through no fault of their own, and may not even become aware that they were aggrieved by the violation, the Commission takes violations of the residency preference law with the seriousness it deserves.

In Layton v Somerville, 24 MCSR 440 (2011), *on reconsideration*, 24 MCSR 619 (2011), in concluding that candidates were improperly granted residency preference, the Commission determined that the word “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, in part, “. . . [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.*” *Id.* (emphasis added). See also Investigation Re: Residency Preference of Certain Pittsfield Firefighters, 32 MCSR xxx (2019) (after investigation, candidates appointed who did not meet residency preference resigned)

Findings and Conclusion

Based on all of the information provided to the Commission, the preponderance of the evidence leaves no room for a conclusion that Firefighter S was qualified to claim a residency preference at the time he was appointed from the December 2016 Certification issued by HRD at Holyoke's request. It must also be inferred that, by erroneously affording him that preference, another duly qualified candidate, likely a minority candidate who did meet the residency preference requirement, was denied the opportunity to be considered and appointed. This violation of civil service law cannot stand without some appropriate remedial action.

The Commission does not overlook the good faith efforts that Holyoke is making to ensure that future hiring cycles do not repeat the mistakes made in the 2016 HFD hiring of Firefighter S. The Commission also recognizes that, save for the lack of candor about his residency, Firefighter S has been employed by the HFD for more than four years and has shown that he is a good firefighter that Holyoke does not want to lose. The Commission recognizes that it must consider balancing these factors with its statutory responsibility to enforce the civil service law and ensure that ALL applicants and civil servants are treated fairly and equitably.

In regard to what action should be taken by the City, the initial question is whether this firefighter's statutory ineligibility to be appointed as Holyoke firefighter in 2017 should bar him from continued employment in that civil service position with the City today. What occurred here is not an administrative oversight which resulted in an invalid appointment of a firefighter through no fault of his own. Here, the firefighter affirmed to HRD, at the time of the examination, that he had continuously resided in Holyoke for one year prior to the examination. The preponderance of the evidence does not support the Appellant's material representation to HRD.

Also, as previously referenced, the firefighter's invalid appointment caused harm to a non-selected candidate who did meet the Holyoke residency preference at the time of the examination. That is particularly important when, as here, the firefighter is claiming residency preference in a community that is subject to a consent decree related to minority hiring. Effectively, the firefighter's appointment here subverted the statutory residency preference requirements, the spirit of the consent decree and basic merit principles, which requires the 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 ..."

Balancing the seriousness of the offense here against the fact that Firefighter S has now been employed by the City for four years, I conclude that remedial equitable action must be taken to rectify the harm that was done to the minority candidates whose names appeared as minority ("C") candidates on Certification 04042 who should have been considered for appointment but for the invalid appointment of Firefighter S, as well as to HFD firefighters hired after Firefighter S whose civil service seniority would be before him but for his invalid appointment.

To achieve this balance, I conclude that, rather than invalidate the appointment of Firefighter S, his status should be converted to a provisional firefighter until March 31, 2024. As a provisional employee, Firefighter S will be able to continue employment with the HFD, but he shall not be entitled to any civil service benefits that accrue to permanent, tenured employees, including, but not limited to, civil service seniority in layoffs and the ability to sit for promotional examinations. G.L.c.32, §§39 & 59. Should Firefighter S wish to maintain his employment as a civil service employee in the HFD after March 31, 2024, he must, between now and March 31, 2024, comply with all statutory requirements under the civil service law to do so (e.g. take and pass a future civil service examination and rank high enough on an eligible list and Certification to be within the statutory 2N+1 for

consideration. To ensure clarity, should Firefighter S wish to improve his chances of appearing high enough on an eligible list between now and 2024 by claiming a Holyoke residency preference, he must now follow the statutory requirements, and only claim such preference if he continuously resides in Holyoke for one year prior to taking a future civil service examination. In short, instead of taking the steps to vacate this unlawful appointment, as would be warranted, the Commission is allowing Firefighter S three years to become eligible for appointment as a civil service firefighter in Holyoke, something he has yet to do. This three-year time period is established in consideration of the likely examination schedule and providing Firefighter S with the opportunity to establish continuous residency in Holyoke one year prior to taking such an examination should Firefighter S wish to apply for the statutory residency preference.

Recommended Orders

Pursuant to the authority granted to the Commission under G.L.c.31, §2 & §72, and the powers of equitable relief provided under Chapter 310 of the Acts of 1993, I recommend that the Commission issue the following orders:

1. HRD shall revive Certification 04042 for the sole purpose of requiring the HFD to appoint at least one additional minority (“C”) candidate whose name was listed on that Certification as tied or below Firefighter S and who was not appointed in the hiring cycle in which Firefighter S was appointed.
2. Firefighter S’s civil service status is converted to *provisional firefighter* and he may remain employed by the Holyoke Fire Department, as a *provisional firefighter*, until March 31, 2024.
3. So long as Firefighter S remains a *provisional firefighter*, he may continue employment with the HFD through March 31, 2024, but he shall not be entitled to any other civil service benefits that accrue to permanent, tenured employees, including, but not limited to, the ability to retain

employment in layoffs over other permanent firefighters and/or sit for any civil service promotional examinations in the HFD.

4. HRD and the City of Holyoke shall take such actions as may be necessary to document or implement the terms of the Commission's orders as stated above.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By a 5-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on March 11, 2021, the Commission accepted and adopted as orders the recommendations of Commissioner Stein.

A 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, a 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:

Russell Dupere, Esq. (for City of Holyoke)

Patrick Bryant, Esq. (for Firefighter S)

Patrick Butler, Esq. (HRD)

Regina Caggiano (HRD)