

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

RICHARD HORAN,
Appellant

v.

G-02-928

BOSTON FIRE DEPARTMENT,
Respondent

Appellant's Attorney:

Frank J. McGee, Esq.
1952 Ocean Street
Marshfield, MA 02050-3424
(781) 834-4690

Respondent's Attorney:

Stephen B. Sutliff, Esq.
City of Boston
Office of Labor Relations
City Hall: Room 624
Boston, MA 02201
(617) 635-4525

Commissioner:

Donald R. Marquis

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Richard Horan (hereafter "Horan" or Appellant") appealed the decision of the Personnel Administrator ("HRD") to accept the reasons of the Respondent, the Boston Fire Department (hereafter "Appointing Authority", or "City"), bypassing him for original appointment to the position of firefighter in the Boston Fire Department. A full hearing was held on October 5, 2005 at the offices of the Civil Service Commission before Commissioner Marquis.

FINDINGS OF FACT:

Thirty (30) documents were entered into evidence at the hearing (Appointing Authority Exhibits 1 – 3 and Appellant Exhibits 1 – 27). Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Susan Willson Goucher, nurse practitioner at Boston Medical Center

For the Appellant:

- Richard Horan, Appellant;

I make the following findings of facts:

1. On June 12, 2002, the state's Human Resources Division (HRD) certified civil service list number 220451 of eligible applicants for 60 permanent firefighter positions in the Boston Fire Department. (HRD subsequently approved the hiring of 61 candidates.) (Appointing Authority Exhibit 3)
2. The Appellant's name was listed on Page 9 of the 21-page certification list of applicants willing to accept appointment. 31 individuals who were ranked lower than the Appellant were selected for appointment. (Appointing Authority Exhibit 3)
3. On August 15, 2002, the Appellant received a pre-placement physical examination at Boston Medical Center. (Appointing Authority Exhibit 2)
4. Dr. James Ryan conducted the above-referenced pre-placement physical examination after the Appellant filled out a medical examination form and met with a nurse practitioner to review his answers on the medical examination form. The nurse practitioner testified at the Commission hearing. Dr. Ryan was not asked by the City to appear and testify for personal medical reasons. (Exhibit 2)

5. On September 5, 2002, Dr. Ryan forwarded a letter to the Boston Fire Department regarding Mr. Horan's pre-placement physical examination stating in part, "I deferred a pass/fail determination in order to provide him with an opportunity to provide me with further information regarding the cause of his anemia...He has now provided me with a report that has raised additional issues including providing false or incomplete answers...I have found Mr. Horan failed to pass the examination due to [four medical reasons listed]...Furthermore, I am concerned that he may well have concealed additional medical conditions that were neither discovered on the physical examination nor mentioned in the hematologist's report. I have coded the failure referencing the conditions cited above, but there is no code for failure due to providing false or incomplete information. This is, however, listed as a reason for failure in Section B on Page 1 of the Medical Examination Form. (emphasis added) (Appointing Authority Exhibit 2)
6. On September 17, 2002, the City informed the state's Human Resource Division that the Appellant had been found medically unqualified for the position of firefighter. (Appointing Authority Exhibit 3 and Appellant Exhibit 1)
7. The Appellant successfully appealed the City's decision to designate him as medically unfit for service to HRD. In a letter to the Appellant dated October 22, 2002, HRD stated in part, "it is HRD's determination that you have passed the Public Safety Medical Examination for appointment as firefighter. HRD's Medical team found that your condition does not preclude you from performing the duties of firefighter." (Appellant Exhibit 3)

8. On October 31, 2002, the City notified HRD that the Appellant was being bypassed for appointment for knowingly providing “false answers and falsified information” on the medical examination form that was reviewed by Dr. Ryan. Specifically, the City cited the fact that the Appellant, in filling out his medical examination form, answered “no” to every question regarding specific medical conditions, failing to disclose several medical conditions he knew he had. (Appellant Exhibit 5)
9. Dr. Ryan and the City identified questions on the medical examination form for which they believe the Appellant provided false information when he answered “no”. (Appointing Authority Exhibit 2)
10. At the hearing before the Commission, the Appellant testified that when he was filling out the medical examination form at Boston Medical Center, he was confused by some of the questions and was advised by a “woman staff member” that he should answer “no” to any question he wasn’t sure about and then discuss it with the doctor that would examine him that day. (Testimony of Appellant)
11. Question #10 on the medical examination form completed by the Appellant on August 15, 2002 asks, “Do you now have or have you ever had...Arthritis or joint injury or disease?”. The Appellant answered “no”. (Appointing Authority Exhibit 1)
In fact, the Appellant had an elbow injury in May 2002 and had a previous knee injury for which he sought disability from the federal government. (Testimony of Appellant)
12. Question #15 on the same medical examination form asks, “Do you now have or have you ever had...Injury or abnormality of arms or legs?” The Appellant answered “no”. (Appointing Authority Exhibit 1). In fact, the Appellant had broken his arm in

October 1997. Further, he injured his elbow in the Spring of 2002 and his elbow was still swollen at the time of the examination. (Testimony of Appellant)

13. Question #36 on the medical examination form asks, “Do you now have or have you ever had...Hernia of any type?” The Appellant answered “no”. (Appointing Authority Exhibit 1). In fact, the Appellant had a hernia operation just three months before filling out the form. The Appellant testified before the Commission that since he had a “type of hernia” operation called an umbilical repair, he wasn’t sure if he should answer yes or no to the question. (Testimony of Appellant)

14. Despite the above-referenced hernia operation which took place just three months prior to the Appellant filling out the form, he also answered “no” to Question #71, which asks, “Do you now have or have you ever had...medical treatment in past 12 months?”. (Appointing Authority Exhibit 1 and Testimony of Appellant)

15. When prompted by the nurse practitioner, the Appellant admitted he had several medical conditions that he had failed to acknowledge on his form. (Testimony of Goucher)

16. The Appellant was not a good witness and his testimony before the Commission was not credible, first placing blame for the false answers on the medical examination form on an unnamed female employee at Boston Medical Center and then claiming that the questions on the form were confusing. That assertion can not be reconciled with the plain, easy-to-understand language of the questions on the medical examination form. The Appellant’s painful attempt to parse the meaning of the word “hernia operation” to this Commissioner was an illustration of his lack of credibility. (Testimony, Demeanor of Appellant)

CONCLUSION:

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). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of 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. 214 (1971). G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58

Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304.

The Appellant, an applicant for the position of Boston firefighter, lied on the medical examination form that all firefighter applicants are required to complete. In doing so, he sought to conceal several medical conditions, including a recent hernia operation, which might jeopardize his candidacy. His false answers were brought to the City's attention by the examining physician, which resulted in the City bypassing him for appointment.

The Appellant's explanation before the Commission, asserting that he was confused by the questions on the medical examination form and that he was told to answer "no" by an unnamed female employee at the medical center, was simply not credible. Even if the Commission were to accept the Appellant's assertion that he was confused by the questions (which we do not), the Commission would be hard-pressed to impose upon the Boston Fire Department an individual who has trouble understanding basic questions on a medical examination form. The Boston Fire Department, and the residents of Boston, would not be well-served by his employment as a firefighter.

The City bypassed Mr. Horan with just cause, providing sound, rationale reasons for its decision and there is no evidence of inappropriate motivations or objectives on the part of the Appointing Authority that would warrant the Commission's intervention.

For all of the above reasons, the appeal under Docket No. G-02-928 is hereby *dismissed*.

Civil Service Commission

Donald R. Marquis, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Marquis and Taylor, Commissioners [Guerin –Absent]) on January 4, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party 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 M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Frank McGee, Esq.

Stephen Sutcliff, Esq.

John Marra, Esq. (HRD)