

**-COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

**One Ashburton Place – Room 503  
Boston, MA 02108  
(617) 979-1900**

**ASHLEY HURST**

*Appellant*

**CASE NO. G1-20-026**

v.

**CITY OF BROCKTON,**

*Respondent*

Appearance for Appellant:

Thomas E. Horgan, Esq.  
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308 Victory Road, Floor 3  
Quincy, MA 02171

Appearance for Respondent:

Ailleen C. Bartlett, Esq.  
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Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Ashley Hurst, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), from her bypass by the City of Brockton (Brockton) for appointment to the position of Fire Alarm Operator (FAO) in the Brockton Fire Department (BFD).<sup>1</sup> A pre-hearing was held on April 10, 2020 and a full hearing was held on July 24, 2020, both via videoconference (Webex). The full hearing was audio/video recorded.<sup>2</sup> Twenty exhibits (*Exhs 1-11, 13-20, PHEXh.21*) were received in evidence and one document marked for

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

<sup>2</sup> Copies of the recording the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

Identification (*Exh. 12-ID*) Proposed Decisions was received from the Appellant and Brockton on October 30, 2020. For the reasons stated below, Ms. Hurst's appeal is denied.

### **FINDINGS OF FACT**

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

*Called by the Appointing Authority:*

- Michael F. Williams, BFD Fire Chief
- Joseph Solomon, BFD Deputy Fire Chief

*Called by the Appellant:*

- Ashley M. Hurst, Appellant
- Business Owner of Company A

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Ashley Hurst, took and passed the civil service examination for FAO on June 15, 2019 and her name was placed on the FAO eligible list established by the Massachusetts Human Resources Division (HRD) on July 10, 2019. (*Stipulated Facts; HRD Prehearing Submission 4/7/20*)

2. An FAO is the "lifeline" for the BFD, taking emergency calls and fire prevention inquiries and inspection requests from the public, dispatching equipment and communicating with fire service personnel on scene. FAOs work in teams of two, on 10 hour and 14 hour shifts. It is a busy, high intensity position. (*Testimony of Dep. Chief Solomon*)

3. On September 26, 2019, HRD issued Certification 06647 authorizing Brockton to appoint two (2) FAOs for the BFD. Ms. Hurst's name appeared on the Certification ranked tenth in a tie group with two other candidates. (*Exh. 3*)

4. Ms. Hurst signed the Certification as willing to accept appointment and completed the required application package. Deputy Chief Solomon conducted a background investigation and

Ms. Hurst was interviewed by a panel consisting of BFD Fire Chief Williams, Deputy Chief Solomon and BFD Firefighter Rodrick. (*Exhs. 7-9; Testimony of Williams & Solomon*)

5. By letter dated December 18, 2019, Brockton Mayor Rodrigues informed Ms. Hurst that she was not selected for appointment as an FAO for four reasons:

- “You are ineligible for employment by the Brockton Fire Department at this time due to your non-compliance with the department’s Tattoo, Body Piercing & Mutilation Police [sic] for New Hires.”
- “You gave an underwhelming interview and did not show a true desire or passion to be a Fire Alarm Operator and member of the Brockton Fire Department. Your answers to questions were short and lacked depth.”
- “In the oral interview, you stated you still worked per-diem for [Company A], but the company stated you have not worked there in over a year.”
- In 2015, you were [involved in an incident reported by] the Bridgewater Police . . . .”

(*Exh.4*)

6. One of the FAO candidates (Candidate A) selected for appointment was tied with Ms. Hurst and the second candidate (Candidate B) selected for appointment was ranked below Ms. Hurst on the Certification. (*Exhs. 3, 8 & 9*)

7. This appeal to the Commission duly ensued. (*Claim of Appeal*)

#### Tattoo Policy

8. Pursuant to the authority vested in the BFD Fire Chief under Brockton Ordinances and BFD Rules and Regulations, in August 2019, the BFD promulgated a policy applicable to all future BFD hires, entitled “Department’s Tattoo, Body Marking, Body Piercing, and Mutilation policy for new hires.”(BFD Tattoo Police) (BFD Body Art Policy). (*Exhs.1, 2, 5, 12 & 14; Testimony of Williams*)

9. The BFD Tattoo Policy states its purpose:

- “a. To establish a policy concerning the professional appearance of all employees and to ensure we are maintaining a professional image.”

“b. The Brockton Fire Department (BFD) has the responsibility of ensuring public safety, maintaining order, and attending to particularly vulnerable and sensitive persons, and to achieve these goals the public must trust and respect its firefighters. Maintaining a professional and uniform fire department is critical to advancing such public trust and respect.”

“c. Tattoos and body modifications, as form of personal expression, are frequently symbolic in nature. These symbols and modifications are often displayed without words, which typically convey precise thoughts and meanings. Consequently, a tattoo or body modification’s symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol or modification can be easily misinterpreted.”

“d. Misinterpretation of visible tattoos and other body modifications worn by firefighters while on duty can cause members of the public to question a firefighter’s allegiance to the safety and welfare of the community, as well as the Department’s. This misinterpretation can damage the public’s trust and respect that is necessary for the Department to ensure public safety and maintain order.”

*(Exh. 5)*

10. The BFD Tattoo Policy prohibits two categories of tattoos, brands and body art: (1) those which depict offensive subjects, such as racial, sexist or other similar hatred or intolerance, are prohibited, whether visible in uniform or not; and (2) tattoos, brands and body art (tongue splitting, disfiguring ears, nose and lips) on the face, head, neck or hands are prohibited if they are “visible to public view while wearing any department issued uniform.” *(Exh. 5)*

11. An applicant who has a prohibited tattoo, brand or mutilation may remove it and be considered for appointment at a future date. The BFD also has indicated that, if a candidate removes a tattoo before the hiring cycle has been completed, reconsideration of an applicant may be possible. *(Testimony of Williams)*

12. The BFD proffered examples of similar tattoo policies adopted by the Brockton Police Department, the Lexington Fire Department, the Stoneham Fire Department; and the Massachusetts Department of State Police; Tattoo Policies of the United States Marine Corp, Navy, Army, Coast Guard and Air Force; and Article XXI, Personal Grooming and Appearance,

Body Art” contained in the 2016-2019 Collective Bargaining Agreement between the Town of Duxbury and the Duxbury Permanent Firefighters Association (*Exhs. 14 through 20*)

13. Several current BFD firefighters have tattoos, brands or body art of the type that the BFD Tattoo Policy prohibits. The policy was promulgated for new hires only because the BFD has entered into a collective bargaining agreement with the local firefighters’ union and application of the policy to current firefighters who are union members would require agreement of the union. (*Testimony of Williams*)

14. Ms. Hurst has five tattoos, none of which fall into the offensive category that would be strictly prohibited. Three floral tattoos and one numerical tattoo are not visible to the public while in uniform. One tattoo, on the side of one finger, an abstract figure Ms. Hurst described as a mustache to honor her father, is visible while in uniform and therefore prohibited under the BFD Tattoo Policy. (*Exhs. 6 & 7; Testimony of Appellant*).

#### Poor Interview

15. Dep Chief Solomon briefed the BFD interview panel on the results of the background investigation of each candidate and the panel then conducted a structured interview with the candidate, asking the same 15 questions of all candidates, plus several questions tailored to each candidate’s circumstances. The candidate also performed a speaking exercise simulating a dispatch call. The panelists took notes and rated the candidates in four categories. Scores were not assigned. The interviews were not recorded (*Exhs. 7 -9; Testimony of Williams & Solomon*)

16. At the Commission hearing, Chief Williams and Dep. Chief Solomon relied substantially on the notes they took to testify about what they recalled about each candidate’s interview. They testified that they both stood by their assessment that Ms. Hurst’s interview performance was next

to last among the six candidates interviewed and well-below that of the two successful candidates. (*Testimony of Chief Williams & Dep. Chief Solomon*)

17. At the Commission hearing, Ms. Hurst thought she had done well during the interview but admitted she was nervous. She recalled going into more detail than Chief Williams and Dep. Chief Solomon. (*Testimony of Appellant*)

#### Misrepresentation of Employment

18. Ms. Hurst stated in her application packet that she had two current employments: a full-time job as a “nail tech” at a salon from October 2015 to present and a “brand ambassador” at events held by a Company A, beverage tasting caterer, from 9/15 to present (per-diem). (*Exh. 7*)

19. Ms. Hurst was asked about her employment as a “brand ambassador” and responded that she worked for Company A on a per-diem basis. Dep. Chief Solomon found this answer dishonest because he understood from a brief telephone conversation with the owner/manager of Company A the day before the interview that Ms. Hurst was “very personable” but that she had not worked an event for over a year. (*Exhs. 7 & 11: Testimony of Dep. Chief Solomon*)

20. At the Commission hearing, Ms. Hurst called the owner/manager of Company A and introduced text messages exchanged between them which confirmed that Ms. Hurst had been one of the “go to” people for several years and that the owner/manager of Company A continued to offer Ms. Hurst the opportunity to work events, most recently, one month before Ms. Hurst’s application to the BFD in November 2019. Ms. Hurst was never terminated or removed from the “call list” maintained by Company A and was never told that she was no longer considered a per-diem “employee”).<sup>3</sup> (*Exhs. 13 & 21; Testimony of Appellant & Business Owner*)

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<sup>3</sup> The owner/manager of Company A often called her brand ambassadors “employees” but she knows that is a misnomer. Ms. Hurst did not receive “wages” or benefits, was hired on an “as needed basis”. Technically, she worked as an “independent contractor”. (*Testimony of Appellant, Business Owner & Solomon*)

21. At the Commission hearing, Ms. Hurst explained that she had been accepting jobs as a “brand ambassador” less frequently after 2017 than in prior years, mainly because her current job at the salon became a full-time job, which made it more difficult to work the tasting events, especially on short notice. At no time did she end the relationship with the beverage tasting company, either voluntarily or involuntarily. (*Testimony of Appellant*)

22. Ms. Hurst texted the business owner on November 4, 2019, informing her that she was applying to the BFD as a dispatcher and asked “What’s my job position. The owner replied: “Brand ambassador”. Ms. Hurst thanked her and the business owner texted back: “No prob.” (*Exh. 21; Testimony of Appellant & Business Owner*)

### **APPLICABLE CIVIL SERVICE LAW**

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31, §1. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev.den., 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or

negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003).

"Reasonable justification . . . means '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' ". Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211,214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission "cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are "*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*," then the occasion is appropriate for intervention by the commission." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L.c.31,§2(b), also gives the Commission's de novo

review “broad scope to evaluate the legal basis of the appointing authority's action”; it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” Id.

## **ANALYSIS**

This appeal is one of two related BFD bypass decisions that the Commission decides today, upholding the two bypasses based on the candidate’s non-compliance with the BFD Tattoo policy. See Matchem v. City of Brockton, CSC No. G1-19-234, 34 MCSR --- (2021) (Matchem Decision)

The Commission’s analysis of the bypass for noncompliance with the BFD Tattoo Policy is substantially the same as the analysis set out in detail in the Matchem Decision which is incorporated herein and will be briefly summarized below. In this appeal, two of the additional reasons given for bypassing Ms. Hurst, her interview performance and the 2015 Bridgewater incident are close calls, but the Commission need not address them as they could not change the Commission’s decision to uphold the bypass. In future hiring cycles, the BFD is encouraged to make a stronger record of interview performance to avoid the risk that, upon review, the Commission may find the process overly subjective and insufficient to establish a basis for bypass by a preponderance of the evidence. The BFD should also take care to ensure that Ms. Hurst has a full and fair opportunity to present her side of the Bridgewater incident during any future application process. Finally, the claim that Ms. Hurst was dishonest in her description of her work as a brand ambassador was not proved by a preponderance of the evidence and should not be used as a reason to bypass her in the future.

On the Appellant’s noncompliance with the BFD Tattoo Policy, as more fully stated in the Matchem Decision, I am persuaded that the BFD has established, by a preponderance of evidence,

that the adoption of that policy is rationally related to legitimate purposes of maintaining order and a uniform and professional image of the BFD that the public will trust and respect, and preserving public confidence in the ability of the BFD to maintain public safety and attend to particularly vulnerable and sensitive persons. The Commission must give appropriate deference to what a public safety department believes to be necessary to regulate its mission and achieve those goals.

I did not overlook the fact that, in this particular situation, it is likely that Ms. Hurst will rarely be on duty in public and that her visible tattoo is barely noticeable. The Commission, however, cannot begin to micromanage the application of this policy and substitute its judgment for that of the BFD, as the Appellant effectively asks us to do, at least so long as the policy does not intrude on constitutional rights, which is not the case here.<sup>4</sup>

The BFD's claim that the Appellant was dishonest about her current status as a "brand ambassador requires a brief comment. An appointing authority is entitled to bypass a candidate who has "purposefully" fudged the truth as part of the application process. See, e.g., Minoie v. Town of Braintree, 27 MCSR 216 (2014). However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. "[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." Kerr v. Boston Police Dep't, 31 MCSR 35 (2018), citing Morley v. Boston Police Department, 29 MCSR 456 (2016) Moreover, a bypass letter is available for public inspection upon request, so the

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<sup>4</sup> It is also apparent that the policy treats new hires differently from current BFD members. Grandfathering a new requirement is not, per se, unlawful under civil service law. See, e.g., Personnel Administration Rules, PAR.23 Smoking Prohibition Rule (effective prospectively 10/6/1988). See also Jucha v. City of North Chicago, 63 F.Supp.3d 820 (N.D. Ill. 2014) (rejecting tattoo artist's equal protection claim for being treated differently than others who were grandfathered under the zoning policy)

consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. See G.L.c.31, §27, ¶2.

The corollary to the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep't, CSC No. G1-16-096, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake about appellant's characterization of past medical history)

In this case, the preponderance of the evidence established that Ms. Hurst was not intentionally untruthful about her status as a "per diem" brand ambassador. She actually confirmed her status with Ms. Parsons before submitting her application to the BFD and was totally blindsided by the claim of dishonesty. A discrepancy, if any, between her understanding of her on-going business relationship with Company A and her actual legal status was understandable and, any misunderstanding was no more than an honest mistake that cannot serve a reasonable justification to bypass her.

### **CONCLUSION**

For the reasons stated herein, this appeal of the Appellant, Ashley Hurst, CSC No. G1-20-020 is **denied**.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

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:

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