

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

CRAIG JABLONSKI,
Appellant

v.

G1-16-144

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Gerard S. McAuliffe, Esq.
Law Office of Gerard S. McAuliffe
43 Quincy Avenue
Quincy, MA 02169

Appearance for Respondent:

Louis Scapicchio, Esq.¹
Office of Labor Relations
City of Boston
1 City Hall Plaza Room 624
Boston, Massachusetts 02201

Commissioner:

Cynthia A. Ittleman

DECISION

On August 16, 2016, the Appellant, Craig Jablonski (Mr. Jablonski or Appellant), pursuant to G.L. c. 31, s. 2(b), filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Fire Department (the Department or Respondent) to bypass him for appointment to the position of firefighter. A pre-hearing conference was held on September 27, 2016 at the Commission's offices in Boston. A full hearing was held at the same location on November 9, 2016.² The hearing was digitally

¹ Attorney Thomas Costello appeared in this case on behalf of the Respondent but he is no longer employed by the Boston Fire Department and the case has been referred to Attorney Scapicchio.

² 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.

recorded and both parties were provided with a CD of the hearing³. The parties submitted post-hearing briefs on December 9, 2016.

FINDINGS OF FACT:

Fifteen Exhibits (1, 1A and 2 through 14) were entered into evidence at the hearing at the request of the Respondent. The Appellant offered no additional exhibits and indicated that the exhibits offered by the Respondent were jointly submitted although he was not stipulating that what is in the documents is true. Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Scott Malone, Deputy Chief, Boston Fire Department

Called by the Appellant:

- Craig Jablonski, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies, and reasonable inferences from the evidence; a preponderance of evidence establishes the following facts:

Background

1. The Appellant is a resident of Boston. He graduated from high school in Canton in 1999. After high school, the Appellant worked in general construction for a period of time. The Appellant also previously worked at the MBTA part time driving a bus for approximately six (6) months. (Testimony of Appellant)

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

2. The Appellant took the 2014 firefighter exam for the first time and passed it. The Appellant was ranked in the 8th tie group on Certification 03286, which Certification was issued by the state's Human Resources Division (HRD) to the Respondent on October 2, 2015 to fill twenty-five (25) vacancies. (Stipulation; HRD November 14, 2018 email (from HRD Attorney Mark Detwiler, copied to parties); Testimony of Appellant) The Respondent hired twenty-five (25) candidates from the October 2, 2015 Certification, including two (2) who were in the 9th tie group, below the Appellant, on the Certification. (HRD November 14, 2018 email. (Id.)
3. Candidates on Certification 03286, including the Appellant, were informed to go to the Respondent's orientation to sign the Certification to indicate their interest in employment. Interested candidates were given an orientation and given an employment application to complete. The Appellant subsequently completed and submitted his application on October 8, 2015, signing it, swearing that his answers to questions on the application are "true and correct in every respect". (Jt.Exs. 2, 3; Testimony of Malone)
4. The Appellant's completed application indicates that he served in the Massachusetts Army National Guard for six (6) years, having been deployed in Iraq from February 2003 to April 2004. He stayed in the Guard for one (1) year after he returned from Iraq. The highest rank the Appellant attained during his service was Specialist E4. In the military, the Appellant drove a truck mainly to transport troops or to escort civilians. He was also involved in various missions while deployed in Iraq. Asked in his application if there "[w]as any type of disciplinary action against [him] in the service? If yes, explain", the Appellant wrote, "I had an argument and my rank was dropped to PFC" [private first

class]. (Jt.Ex. 2; Testimony of Appellant) The Appellant was honorably discharged at the end of his six (6)-year term of service. He is a disabled veteran. (Id.)

5. The Appellant indicated on his application that he worked at a utility company from 2001 to 2013. At the utility, he was an underground lineman, splicing, repairing, installing and removing underground electric cables; he also prepared safety reports and time sheets for his crew. In 2007, the Appellant received an award from the utility for informing college students renting apartments in Boston about fire hazards. (Jt.Ex. 2; Testimony of Appellant)
6. The Appellant's application indicates that, beginning in July, 2014, he worked at a concrete company erecting concrete forms. He was laid off in April 2015, following which he began working at a specialty commercial construction company. He was laid off from the specialty construction company in June, 2015. In October, 2015, the Appellant began work as a carpenter at a floor systems company, where he was working at the time of his bypass. (Jt.Ex. 2)
7. On his application, the Appellant answered "no" in response to questions asking if he had ever been convicted of a felony or a misdemeanor within the previous five (5) years "other than a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace", or convicted of a misdemeanor "(other than a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace) more than 5 years ago which resulted in a jail sentence from which [he] was released within the last five years". (Jt.Ex. 2)
8. In response to the application question, "[d]o you possess a valid driver's license", "[h]as your license to operate a motor vehicle in this state, or any state, ever been suspended or

revoked”, and, “[i]f yes, state where and give details”, the Appellant checked “yes” and wrote, “Connecticut. I refused a breathalyzer test in February 2014[.] I lost my Class A license for 1 year and Class D for 6 months[.]” (Jt.Ex. 2)

9. Asked in the Respondent’s application for employment if he has “ever been disciplined or asked to resign from any job in the last seven years? If yes, supply details (continue on additional pages, if necessary)”, the Appellant wrote, “I resigned from [the utility company] in 2013”. (Jt.Ex. 2) The reason he resigned is that he had a driving accident in a company vehicle during a storm in Connecticut. (Jt.Ex. 5; Testimony of Appellant) There did not appear to be damage to either vehicle but the Appellant left the scene, which he recognizes was a bad decision. The other driver called the utility company about the Appellant’s involvement in the accident. The utility suspended the Appellant but the suspension was removed when he resigned. He was not forced to resign but his union advised him that it was better to do so. He had no other discipline while working for the utility company. (Testimony of Appellant) In fact, the Appellant provided two (2) professional references from the utility: one (1) from a foreman and one (1) from a colleague who knew the Appellant for between eight (8) and ten (10) years each. The Appellant also listed professional references for each of the other prior employers he wrote on his application. There is no indication in the record that the Respondent’s investigator contacted these professional references, nor any of the other professional references that the Appellant provided on his application. (Jt.Exs. 2, 5; Administrative Notice) If the investigator and/or the Respondent questioned the Appellant’s notation on the application that he had been laid off from two (2) of the jobs he listed on the application, they could have contacted the Appellant’s professional references.

10. Asked if his “license to operate a motor vehicle in this state, or any state, ever been suspended or revoked”, the Appellant wrote, “Connecticut[.] I refused a breathalyzer test in February 2014 (sic) I lost my class A license for 1 year and Class D for 6 months”.
- (Id.)
11. On October 14, 2015, the Respondent obtained the Appellant’s Massachusetts RMV driving record. With respect to motor vehicle violations, the record indicates only that the Appellant refused to take an OUI breathalyzer test in Connecticut and that his CDL license was revoked for one (1) year.⁴ (Jt.Ex. 8) At the Commission hearing, the Appellant testified that his OUI case was continued for a year, he was represented by an attorney, he reported to a probation officer for one (1) year, and thereafter the court case was dismissed. (Testimony of Appellant)⁵
12. On November 10, 2015, the Respondent’s Office of Human Resources obtained the Appellant’s Criminal Record Information (CORI). The CORI report states that in 2008 the Appellant was charged with larceny from a person, a felony, in Boston and that the “disposition type” was “non conviction”. (Jt.Ex. 6) A Boston Police incident report for this charge alternatively refers to one (1) suspect and two (2) suspects. Further, it states that the victim reported that two (2) white, heavy-set men⁶ were in a dark Tahoe, they stopped the victim and one of them punched the victim and demanded his wallet; the victim obliged. An update to the police incident report, written a couple of weeks later, states that someone who called himself “Mr. A” called the victim’s father, whose phone number was in the stolen wallet, and Mr. A said he had the victim’s wallet and wanted to return it. The victim’s father told the victim. The victim called Mr. A and they agreed to

⁴ Firefighters need not have a CDL to drive fire department vehicles. (Testimony of Malone)

⁵ There are no Connecticut court records in evidence in this case.

⁶ The Appellant was heavy-set at the time. (Testimony of Appellant)

meet to return the wallet to the victim. The victim informed police of this meeting and he reported that Mr. A had a distinct facial scar. Police showed the victim a number of photos and the victim stated that Mr. A, who has a distinct facial scar, was responsible for the larceny. The police sought a criminal complaint in court against the Appellant.

(Jt.Ex. 7) However, the Appellant testified at the Commission that he was not present when the wallet was stolen and that it was his roommate who stole the wallet; neither he nor his roommate drove a dark Tahoe (the Appellant had a 2001 beige Lincoln Navigator at the time); the Appellant wanted to return the wallet to the victim; the Appellant's roommate went with the Appellant to return the wallet; and the criminal charge against the Appellant was dismissed when he appeared in court. (Testimony of Appellant)

There is no indication whether a second suspect was identified and criminally charged.

(Administrative Notice)

13. The Appellant's CORI also indicated that in 2001 he was charged with disorderly conduct, a misdemeanor in Wrentham District Court and the "disposition type" for the charge was "non conviction". (Jt.Ex. 6) During his employment application interview by the Respondent, the Appellant indicated that the disorderly charge resulted from a fight in which he was involved at a concert in Foxboro. (Jt.Ex. 14)

14. Not in the Appellant's CORI but in the Boston Police Department's records, a 2005 incident summary report states that the Appellant was the victim in a fight in a Boston Bar, where he was hit in the face with a glass bottle and transported to a hospital. The suspect was taken into protective custody. The Appellant informed police he did not wish to pursue the matter in court and the case was "cleared for lack of Prosecution". (Jt.Ex. 13)

15. After receiving the candidates' completed applications, Deputy Chief Malone asks a private investigator service to perform background checks on the candidates. The background investigation includes a home visit, and talking to the candidates' references, neighbors and employers and conducting internet searches about the candidates. Upon completion of the background investigations, the investigators meet with Deputy Chief Malone to review the information they have compiled. (Jt.Exs. 10-12; Testimony of Malone)
16. Private investigator Smith was assigned to conduct the Appellant's background investigation. She apparently reviewed⁷ the Appellant's birth certificate, military discharge form (DD214), driver's license, car registration, car insurance policy, driver history from the RMV, social security card, employment history for the prior ten (10) years, two (2) years of tax records, and a credit check. (Jt.Ex. 5) The investigator's report validated the Appellant's Boston address and indicated that the investigator spoke with three (3) long term personal references, from friends or family friends, who provided very positive references, including one (1) who reported that the Appellant went into a home on fire about six (6) years earlier and he helped those inside escape before first responders arrived. The investigator's report did not indicate that the investigator contacted the Appellant's professional references, even though the Appellant provided two (2) such references with whom he had worked at the utility. (Jt.Ex. 5)
17. On or about December 28, 2015, the investigator concluded, in part,

⁷ The investigator report has a checkmark next to each of the listed documents. However, they are not attached to the investigator's report so it is unclear if the investigator only reviewed them or obtained copies that were included in the Appellant's application file. The investigator states elsewhere in the report that it includes a documents checklist, residency inquiry notes, address summary printout, personal references/questionnaires/verifications, and employment confirmation. All of those documents appear to be included in the investigator report except the employment confirmation. (Jt.Ex. 5)

Investigators met with Craig at his residence ... in Dorchester which he owns & shares with his wife & young son. We confirmed his residency through our databases.

Mr. Jablonski has a laundry list of issues with respect to his candidacy, most importantly his arrest for DWI in 2014. He declined a breathalyzer but failed the field sobriety test. He informed me that the charges were dropped so further investigative efforts will be needed to confirm this ... He did not deny this ... We asked about his resignation from [the utility] as we were under the impression that it was due to his loss of license & that he would not be able to drive the company vehicle. I was informed by him that he was asked to resign due to an incident where he was accused of leaving the scene of an accident in 2013 while using the company vehicle. Craig denied that he left the scene but his Union Rep. suggested that resigning would be best for him. Now Craig is a laborer. To his credit, he has been able to continue to work.

He was demoted in rank while in the Military due to an argument. When asked what kind of argument he responded that it was a disagreement. He did not elaborate.

Craig ... has made some bad choices

(Jt.Ex. 5)

18. At the Commission hearing, the Appellant testified that he had had a verbal argument with a Staff Sergeant while in the service but that he could not recall what the argument was about. (Testimony of Appellant)
19. On January 26, 2016, Dep. Chief Malone, District Chief Whelan and then-Human Resources Director Robert Moran interviewed the candidates after receiving the background investigation information, including the Appellant, giving the candidates a chance to respond to any issues that arise as a result of the background checks. The interviews lasted approximately one-half hour, although the Appellant's interview may have lasted a bit longer. In the interviews, candidates were asked to answer six (6) questions and their responses were rated from poor to excellent (1 to 5). The questions were: 1) "[w]hy do you want to become a firefighter?"; 2) [t]ell us some history that you know regarding the BFD? ;] 3) [t]ell me about a work emergency or crisis of some kind

in which you were involved. What was your role? What did you do?[:;] 4)⁸ [t]ell me a time when you set specific work goals for yourself. How did things turn out?[:;] 5) [w]hat technical skills or other qualities do you bring to the position?[:;] 6) [h]ow can you convince us that you will not be sent back to the Personnel Department because the trainers from the FA said you are not acceptable?” (Jt.Ex. 10) The interviewers made notes on the list of questions regarding the candidates’ responses. In response to question 1) the interviewers noted that the Appellant said that he wanted to be a firefighter to help people, be a role model for his son and for the brotherhood in the fire department. In response to question 2) the interviewers noted that the Appellant answered, in part, that he has many friends and a brother in the BFD. In response to question 3) the interviewers noted that the Appellant said that while in the military an IED exploded next to his truck and he checked others for injuries and the truck for damage. In response to question 4) the interviewers wrote that the Appellant said that he wanted to be a good role model for his son. In response to question 5) the interviewers noted that the Appellant said he has hydraulic tools and carpentry skills. In response to question 6) the Appellant answered that he is driven to succeed. Dep. Chief Malone’s scoring on the question sheet gave the Appellant a score of 24 (out of 30 total points), marking the Appellant’s answers to every question as a 4 (“good”), which Dep. Chief Malone considered an average score. The interview notes of the other two (2) interviewers are not initialed so it is unknown whether Mr. Moran or Dis. Chief Whelan wrote the notes on the question sheets but one (1) of them gave the Appellant a score of 23; the other interviewer did not score the Appellant. One (1) of the other two (2) interviewers wrote some of the Appellant’s employment history, including his job at the utility, on the sheet of questions. The third

⁸ The questions are numbered incorrectly as follows: 1), 2), 3), 4), 4), 5), which total six (6) questions.

interviewer made notes on the question sheet stating, in part, that the Appellant joined the National Guard, left a vehicle in an accident, that a charge against him had been dismissed, he “lost CDL for refusal”, his vehicle’s “break link broke”, there were two (2) bar room incidents involving the Appellant, and the Appellant had been a member of the Carpenters’ Union. (Jt.Exs. 10-12; Testimony of Malone)

20. On a separate piece of paper, Dep. Chief Malone also took other notes at the Appellant’s interview indicating that:

the Appellant resigned from the utility in 2013 after he left the scene of a car accident when he was driving a company vehicle;

the Appellant was involved in an OUI for which he was prosecuted, although the Appellant told the Respondent’s interviewers that the accident was caused by a broken brake line and he used the emergency brake to try to stop; that he drank alcohol prior to being stopped for the OUI, that he knows there is a zero alcohol tolerance for CDL drivers like him and that he knew that he could not pass the breathalyzer test;

the Appellant denied he was the robber in 2008 and Dep. Chief Malone wrote “not truthful”;

the Appellant had been in a fight at a concert in Wrentham and in a fight at a bar in a different place where he was hit with glass; and

“NO”.
(Jt.Ex. 9)

A Boston Police department incident summary report about the 2005 fight indicates that the Appellant was a victim and that he informed police he did not wish to pursue the matter in court. (Jt.Ex. 13) The Respondent did not rely on the 2005 incident to bypass the Appellant, although the 2005 incident summary report is included in the Respondent’s exhibits. (Jt.Ex. 14)

21. By letter dated June 24, 2016, Fire Commissioner Joseph Finn (Commissioner Finn) informed the Appellant that he was being bypassed. The reasons Commissioner Finn

provided included the Appellant's "poor employment history"; 2008 larceny (felony) charge which the Appellant said resulted from a misidentification and the Appellant used someone else's name; 2001 disorderly conduct charge; driving record, including the refusal to take a breathalyzer test and loss of the Appellant's CDL license for a year⁹; failure of a field sobriety test during an OUI stop; failure to disclose in his application that he left his job at the utility in connection with leaving the scene of an accident; and military demotion following an argument, which the Appellant failed to explain. (Jt.Ex. 14)

22. The Appellant timely filed the instant appeal. (Administrative Notice)

DISCUSSION

Applicable Civil Service Statutes and Rules

The authority to bypass a candidate for original appointment to a permanent civil service position is set forth in G.L. c. 31, s. 27, which states, in pertinent part:

If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest.

Id.

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv.

Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an

⁹ The Appellant's RMV driving record appears to be lengthy, having twenty-three (23) entries but seventeen (17) of the twenty-three (23) indicate that either the Appellant or his employers requested a copy of his driving record at various times, not motor vehicle infractions or accidents, and that six (6) of the entries relate to the Appellant's refusal to take the breathalyzer test in Connecticut in 2014, the suspension of his license in 2014 and the reinstatement of his license in 2015.

action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)). An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010).

“In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” City of Beverly, 78 Mass.App.Ct. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). “[T]he commission does not act without regard to the previous decision of the town, but rather decides whether „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.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)). As a result, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown.” City of Beverly, 78 Mass.App.Ct. at 188.

“In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions” City of Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304, *rev. den.*, 426 Mass. 1102 (1997)(citing Murray v. Second Dist. Court

of E. Middlesex, 389 Mass. 508, 514 (1983); Kelleher v. Personnel Adm'r. of the Dept. of Personnel Admin., 421 Mass. 382, 387 (1995); Police Comm'r. of Boston v. Civil Serv. Comm'n., 22 Mass.App.Ct. 364, 370, *rev. den.*, 398 Mass. 1103 (1986)). “When there are, in connection with personnel decisions, 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, 43 Mass.App.Ct. at 304. “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id. (citing Sch. Comm'n. of Salem v. Civil Serv. Comm'n., 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm'r. of Health & Hosps. of Boston v. Civil Serv. Comm'n., 23 Mass.App.Ct. 410, 413 (1987)).

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant in 2016. Specifically, the Respondent had reasonable justification to bypass the Appellant based on his leaving the scene of a car accident in which he was driving his employer’s (the utility’s) vehicle in Connecticut in 2013, his OUI in 2014, and his demotion in the military. With respect to the charge of leaving the scene of an accident, there is no notation in the Appellant’s Massachusetts driving record or CORI in this regard. In addition, there is no specific question in the Respondent’s employment application directly related to this aspect of his driving record. However, in the section of the Respondent’s employment application related to prior employment, when asked to explain the reason he left the employ of the utility, the Appellant wrote simply “resigned” (sic). Asked in the Respondent’s application if he was ever “disciplined or asked to resign from any job in the last

seven years? If yes, supply details (continue on additional pages, if necessary)”, the Appellant wrote only, “I resigned from [the utility] in 2013”, providing no details. Jt.Ex. 2. It was not until the background investigator met with the Appellant at his home that the investigator learned that the Appellant resigned from the utility because of the allegation that he had left the scene of the accident while driving one of its vehicles. The Appellant denied to the Respondent’s investigator that he had left the scene of the accident, saying only that his union representative at the utility suggested he resign, instead of being fired. At the Commission hearing, the Appellant admitted that he left the scene, although he asserted there was no car damage, and admitted that it was a bad decision for him to leave the scene. Firefighters must be able to safely and responsibly operate fire department vehicles in highly stressful situations. The Respondent was reasonably justified to be concerned that the Appellant would not be able to safely and responsibly operate fire department vehicles in view of his decision to leave the scene of an accident only two (2) years prior to his application for employment in the Boston Fire Department.

The Appellant’s OUI added justification for his bypass. To his credit, the Appellant reported the OUI in Connecticut in his application for employment at the Boston Fire Department and that he lost his CDL for year and his standard driver’s license for six (6) months for refusing a breathalyzer test when he was stopped for OUI. Jt.Exs. 2, 8; Testimony of Appellant. However, the OUI occurred in 2014, only one (1) year prior to the 2015 firefighter exam that the Appellant took in connection with this appeal. His CDL license was not reinstated until 2015, the same year as the exam. Although firefighters are not required to obtain a CDL, the Appellant also lost his standard license for six (6) months just months prior to the firefighter exam. At the investigator’s home meeting with the Appellant, the Appellant confirmed that he

refused the breathalyzer and disclosed that he failed the police field sobriety test. At his interview with Dep. Chief Malone, et al, the Appellant admitted that he drank alcoholic beverages earlier in the day that he was stopped for an OUI, he knew that there is a zero tolerance of alcohol for CDLs, and that, therefore, he knew he could not pass the breathalyzer test. However, at the same interview the Appellant attempted to deny that he was operating under the influence of alcohol, asserting that his car swerved because the brake line in his car was broken and he used the emergency brake to try to stop. While the Appellant's comments about the OUI are inconsistent, his RMV driving record is clear: his license was revoked in 2014 based on his refusal to take the breathalyzer test. The OUI provided further justification for bypassing the Appellant.

The Appellant's military record also added justification for his bypass. The Respondent's application specifically asks applicants who have served in the military if they were disciplined while in service. The Appellant replied "yes" and added, "I had an argument and my rank was dropped to PFC." Jt.Ex. 2. When asked by the Respondent's investigator what kind of argument had occurred, the investigator reported that the Appellant responded, "it was a disagreement. He did not elaborate." Jt.Ex. 2. At the Commission hearing, the Appellant testified that he had had a verbal argument with a Staff Sergeant while in the service but that he could not recall what the argument was about. The Boston Fire Department is a paramilitary organization and requires members of the Department to follow orders of superiors to ensure appropriate functioning of the Department, especially under frequent, highly stressful circumstances. While the Appellant's discharge was honorable, his argument with a superior was significant enough to result in his demotion. Although the Appellant's military service

ended approximately a decade prior to the bypass, it was a valid matter for the Respondent to take into consideration in deciding whether it should hire or bypass the Appellant.

The Appellant's resignation from the utility in connection with his decision to leave the scene of an accident and his OUI and the resulting loss of his licenses for lengthy periods, coming within one (1) or two (2) years of taking the 2015 the firefighter exam, provide reasonable justification for the Respondent's decision to bypass the Appellant. Although the Appellant's military demotion occurred years ago, it provided further justification for the bypass given the paramilitary nature of a fire department, which requires its members to obey orders, not argue, for their own and public safety. Moreover, when the investigator asked the Appellant what kind of argument he had had in the military, the Appellant said only that it was a disagreement and provided no further explanation. Thus, the Appellant's military demotion and failure to provide additional information in that regard further provide reasonable justification for bypassing the Appellant.

The Respondent did not establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on the 2001 and 2008 criminal matters.¹⁰

As noted in the Commission's decision in Benevento v. Springfield Fire Department, 24 MCSR 144 (2011)¹¹,

¹⁰ The Respondent produced a Boston Police Incident Summary Report for an incident in 2005 in which the Appellant was the victim of an assault and battery. The bypass letter sent to the Appellant does not rely on the 2005 incident report.

¹¹ I have applied the Commission's caselaw with respect to firefighter candidates as it existed at the time the instant appeal was filed. *See, e.g., Benevento v. Springfield Fire Department*, 24 MCSR 144 (2011). Subsequently, in 2018, the Commission ruled in Docket No. G1-15-70 that a fourteen (14)-year old continuance without a finding (CWO) regarding a criminal court case was not reasonable justification for bypassing the *police officer* candidate although his driving record provided reasonable justification therefor. The candidate appealed to the Superior Court, which upheld the Commission's decision regarding the CWO but remanded the case to the Commission as to the question whether the candidate's driving record provided reasonable justification for the bypass. Suffolk Superior Court, C.A. No. 1784CV00999 (Feb. 9, 2018). While on remand, the candidate and the Boston *Police* Department submitted a joint request for relief for the candidate, which was allowed by the Commission and the court case was dismissed. Later in 2018, in Docket No. G1-17-194 the Commission ruled that the Boston Police Department did not provide reasonable justification to bypass the candidate by relying on: 1) a sixteen (16)-year old admission to

There is no question that a firefighter must be honest, trustworthy, and dependable in order to properly perform the duties required of a public safety official generally. *E.g.*, Matthews v. City of Boston, 22 MCSR 450, 452 (2009). As such, a candidate's criminal background is a serious and legitimate concern for an appointing authority. "The Commission has long held that an applicant's arrest record, even in the absence of a conviction, is entitled to some weight by the appointing authority in making its decision." Labriola v. Town of Stoneham, 25 MCSR 36, 38 (2012) (citing Thames v. Boston Police Dep't., 17 MCSR 125, 127 (2004); Soares v. Brockton Police Dep't., 14 MCSR 109, 110 (2001); Brooks v. Boston Police Dep't., 12 MCSR 19, 20 (1999); Frangie v. Boston Police Dep't., 7 MCSR 252, 253 (1994)). While the Commission recognizes that an appointing authority has considerable discretion in selecting a candidate for appointment, the appointing authority must still meet its burden of proving there was "reasonable justification" for its action. Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304, *rev. den.*, 426 Mass. 1102 (1997). However, the time period in which criminal matters may be considered in the hiring of public safety employees is not without end. Id.

As further noted in Benevento v. Springfield Fire Department, *infra*, there are statutory provisions relating to candidates for certain civil service employment and criminal conduct.

Various statutes bar employment of a person as a police officer who has been convicted of a felony. *See* G.L. c. 31, s. 50 and G.L. c. 41, s. 96A. However, such statutes do not apply to firefighters and the Respondent has not established that the Appellant has been convicted of a felony.

Further, the Respondent's reliance on the 2001 and 2008 criminal matters is flawed. First, the Respondent's employment application form asks the candidates to indicate if they have "ever" been convicted of a felony, if they have been convicted of a misdemeanor within the last five (5) years ("other than a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace"), and if they have been convicted of a misdemeanor (other than drunkenness, etc.) more than five (5) years ago that resulted in a jail

sufficient facts to a charge of felony larceny by that candidate, which charge was dismissed in 2018 after that candidate was granted a new trial; and 2) the candidate's limited driving infractions without considering that that candidate's job required him to frequently drive his clients and that the Police Department had recently requested that the Commission grant relief to another candidate with a worse driving record.

sentence “from which [they] were released within the last five years”. Jt.Ex. 2. However, G.L. c. 151B, s. 4 and 804 CMR 3.01 preclude employers from asking job candidates for their criminal record in employment applications. Second, although the Respondent produced for the record the Appellant’s CORI, the only disposition information the CORI provides for the 2001 and 2008 charges is “non conviction”. The Appellant testified at the Commission that in his 2001 disorderly charge, a misdemeanor, the case was continued without a finding for six (6) months, following which the case was dismissed. However, the 2001 charge was approximately fifteen (15) years old when he applied to be a Boston Firefighter and the charge is stale. In 2008, the Appellant was charged with larceny, a felony. The Respondent did not obtain any related court records to indicate the outcome in the 2008 charge. Instead, the Respondent produced a Boston Police incident report of the underlying incident, which states that the victim stated there were two (2) people involved in the larceny, one (1) of whom punched the victim. However, the incident report only indicates one suspect – the Appellant. The Appellant asserts that it was someone sharing his apartment at the time who accosted the victim and took his wallet, that his (the Appellant’s) only involvement was to return the wallet days later. The incident report states that the victim specifically identified the Appellant from a photo array because of a unique scar on the Appellant’s face. While it is accurate that the Appellant has a distinct facial scar, it is unclear if the victim recalled the Appellant’s face because he saw him at the time he (the victim) was robbed or when the Appellant returned his wallet. In addition, there is no indication that a second suspect was identified and criminally charged. Further, the incident report states that the victim alleged that the suspect/s drove a dark car but the Appellant testified at the Commission that he had a beige car at the time. Moreover, the Appellant testified at the Commission that the larceny charge against him was dismissed when he went to court. In view of the uncertainties in

this regard, the larceny charge does not provide reasonable justification for bypassing the Appellant, although it is closer in time to the Appellant's bypass.

The Respondent did not establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on the Appellant's "poor employment history". Jt.Ex. 14. Aside from the Appellant's resignation from the utility after leaving the scene of an accident, there is no indication in the record that he incurred discipline otherwise during his long-term employment at the utility that the investigator spoke to the Appellant's professional references at the utility. If the Respondent had concerns about the Appellant's layoffs from two (2) prior employers after relatively brief periods of employment, it could have contacted the Appellant's professional references or others at his former employers but there is no indication in the record that it did so. As a result, the Respondent did not establish by a preponderance of the evidence that the Appellant had a poor employment history.

Conclusion

The Respondent established by a preponderance of the evidence that it provided reasonable justification to bypass the Appellant for the specific reasons identified herein.

Therefore, the Appellant's appeal, docketed as G1-16-144, is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 6, 2018.

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)(1), 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:

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