

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

KELLEN M. JOLLY,
Appellant

v.

CITY OF ATTLEBORO,
Respondent

Case No.: G1-21-150

DECISION

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

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission and the parties. The parties had thirty (30) days to provide written objections to the Commission. The Commission did not receive any written objections.

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

The decision of the City of Attleboro to bypass the Appellant for original appointment as a firefighter is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on May 20, 2022.

CIVIL SERVICE COMMISSION

Christopher C. Bowman
Christopher C. Bowman
Chair

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.

Notice to:

Daniel M. Rich, Esq. (for Appellant)

Timothy D. Zezzin, Esq. (for Respondent)

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

COMMONWEALTH OF MASSACHUSETTS

**DIVISION OF ADMINISTRATIVE
LAW APPEALS**

14 Summer Street – 4th Floor
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KELLEN M. JOLLY,
Appellant

v.

G1-21-150
CS-21-0354

CITY OF ATTLEBORO,
Respondent

Appearance for Appellant:

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Norton, MA 02766

Appearance for Respondent:

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Administrative Magistrate:

Kenneth Bresler

SUMMARY

The Administrative Magistrate of the Division of Administrative Law Appeals (DALA) recommends that the Civil Service Commission deny the Appellant’s appeal.

TENTATIVE DECISION OF DALA MAGISTRATE

On August 24, 2021, the Appellant, Kellen M. Jolly (Appellant), pursuant to G.L. c. 31, § 2(b), filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the City of Attleboro (City) to bypass him for original appointment to the position of

firefighter. (Stipulated Fact) The Commission held a pre-hearing conference on September 30, 2021 via Webex videoconference and referred the appeal to DALA. I held a full hearing in person at the Commission, One Ashburton Place, Room 503, Boston on November 18, 2021.¹ The hearing was digitally recorded.² The parties submitted post-hearing arguments.

FINDINGS OF FACT:

Thirteen (13) exhibits were entered into evidence at the hearing (Appellant Exhibits 1-2 (A1 – A2) and Respondent Exhibits 1-11 (R1 – R11)). Based on the exhibits and the testimony of the following witnesses:

Called by the City:

- Chief Scott T. Lachance, Attleboro Fire Department;
- Deputy Chief Timothy Michael Birch, Attleboro Fire Department;

Called by the Appellant:

- Kellen M. Jolly, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² 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 substantial evidence, arbitrary or 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.

Application Process

1. On November 20, 2020, Mr. Jolly took the civil service examination for firefighter and scored 99. (Stipulated Fact, Testimony of Appellant)
2. On March 15, 2021, the Human Resources Division established an eligible list for firefighters. (Stipulated Fact)
3. On July 8, 2021, the Human Resources Division sent Certification No. 07924 to the City. (Stipulated Fact)
4. Mr. Jolly ranked 10th on the certification of candidates willing to accept appointment as a firefighter; he was tied with five other candidates. (Stipulated Fact)
5. On July 16, 2021, Mr. Jolly signed an application to be a firefighter with the Attleboro Fire Department. (Exhibit R1)
6. On his application, under “Employment History,” Mr. Jolly wrote that among the places he had worked was R & B Limousine in North Attleboro from March 2021 to June 2021. He worked as a delivery driver. (Exhibit R1, p. 12)
7. Despite the name of the company, R & B Limousine’s primary business was as a third-party delivery service for Amazon. All 20 or so employees of R & B Limousine delivered Amazon packages. (Testimony of Appellant, Lachance, and Birch (recounting telephone conversation with R&B owner))
8. Mr. Jolly’s job as a delivery driver for R & B Limousine was to go to an Amazon warehouse, get packages, and deliver them. (Testimony of Appellant)
9. The application asked, “Have you ever been fired or forced to resign because of misconduct or unsatisfactory employment?” If the answer was yes, the application asked the applicant to provide details. (Exhibit R1, p. 14)

10. Mr. Jolly answered “yes” to this question and explained:

At a previous job, I engaged in a verbal disagreement with a coworker. I was then accused by this coworker of stealing an Amazon delivery package. Although there was zero evidence of this, due to the coworker’s seniority in the company, his word was taken over mine. I have never stolen anything before, nor did I steal a package from my job.

(Exhibit R1, p. 14)

11. The application also asked:

Have you ever been subjected to disciplinary proceedings from former or current employers? Disciplinary proceedings include, but are not limited to: suspension, docking of pay and/or written reprimand.

(Exhibit R1, p. 14)

12. Mr. Jolly answered “no.” (Exhibit R1, p. 14)³

13. Mr. Jolly signed a statement on the application that included language reading,

...I am aware that willfully withholding information or making false statements on this application will be the basis for rejection of my application....

14. On three separate pages of the application, Mr. Jolly signed, before a notary public, a statement including language that he did “solemnly swear that each and every answer is full, true, and correct in every respect.” (Exhibit R1, pp. 23, 24, and unnumbered page titled, “Notary Public’s Seal”)

15. On August 10, 2021, four interviewers from the City’s fire department interviewed Mr. Jolly for about 20 minutes. The interviewers were Chief Lachance, Deputy Chief Birch, Assistant Chief John Guenette, and District Chief Thomas Joubert. ((Exhibits R2 and R4, testimony of Appellant, Lachance, and Birch)

16. The interview was not recorded. (Testimony of Lachance and Birch)

³ Mr. Jolly’s position at the hearing seemed to have been that because he had received an oral reprimand, rather than a written reprimand, his “no” answer was accurate. Mr. Jolly seemed to have dropped that argument in his post-hearing submission.

17. During the interview, the interviewers became more confused about the circumstances of R & B Limousine's firing of Mr. Jolly. (Testimony of Lachance)
18. At the end of the interview, the interviewers were concerned that Mr. Jolly had stolen Amazon packages. (Testimony of Birch)
19. Honesty is an important trait for firefighters, especially because their duties bring them into people's homes. (Testimony of Birch)
20. Because the interviewers perceived that what Mr. Jolly wrote on his application conflicted with what he said in his interview, Chief Lachance telephoned the owner of R & B Limousine, Ali Ghoneim, on August 16, 2021. Deputy Chief Birch also telephoned Mr. Ghoneim around then. (Exhibits R3, R10, testimony of Lachance and Birch)
21. Deputy Chief Birch had hoped to hire Mr. Jolly because he was friends with Mr. Jolly's parents, had seen Mr. Jolly occasionally while Mr. Jolly grew up, and considered him a good kid. (Testimony of Birch)
22. When the City selected 13 candidates for appointment as firefighters, it selected six who ranked below Mr. Jolly. (Stipulated Fact)
23. On August 18, 2021, the City sent Mr. Jolly a bypass letter, signed by Chief Lachance. (Exhibit R2)
24. The City's bypass letter cited the following reasons and alleged the following about Mr. Jolly: 1) he was forced to resign from R & B Limousine; 2) he made false and misleading statements on his application related to his resignation; 3) he failed to disclose disciplinary action; and 4) he interviewed poorly. (Exhibit R2)
25. Under a heading reading "Material Discrepancies Between Application Responses and Information Provided During Interview and Background Investigation," the letter stated:

During your interview with the Panel...you were asked if there was anything in your background that you wanted to discuss with the interview panel. You told the panel that, while employed by a company to deliver Amazon packages, you were unexpectedly called into work early one morning and told that Amazon Loss Prevention had accused you of stealing packages while you were a delivery driver for R & B Limousine. When asked how they had come to this conclusion, you were unable to provide an answer. You confirmed that you were required to take photographs of each delivery. When asked how many packages were reported missing/stolen, you were unable to provide an answer. You then told the Panel that you were told that if you didn't resign, that the company would file a police report. Although you claimed that you wanted the police to conduct an investigation, there was no investigation and you promptly resigned from the company.

You were then asked if you had any issues or problems with coworkers at previous jobs. You responded that you did not have any problems with coworkers; however, in your application you indicated that you did have a verbal disagreement with a coworker that led to your resignation.

As part of our background investigation, I spoke to your supervisor, Mr. Ali Ghoneim, at R & B Limousine. He confirmed that Amazon Loss Prevention had in fact accused you of stealing packages and that you immediately resigned from the company when confronted with this allegation. He stated that you could have requested a police investigation to prove your innocence, but you instead chose to resign.

I asked Mr. Ghoneim about the verbal disagreement that you documented in your application. He explained that the verbal disagreement was a separate incident, unrelated to the accusation of stealing that led to your resignation. He explained that you had a verbal disagreement with a dock worker that was reported to him. He further stated that his investigation into that incident led him to conclude that you were at fault and that you "escalated" the incident. His investigation included review of video surveillance. Mr. Ghoneim stated that he reprimanded you for this incident.

You did not disclose this disciplinary action on your application.

Although you documented that you were forced to resign on your application, you provided false and misleading information regarding the circumstances that led to your resignation.

Your forced resignation from R & B Limousine, your false statements on your application for employment related to that resignation, and your failure to disclose disciplinary action taken as a result of a verbal disagreement with the dock worker serve as independent reasons for bypassing you for the important public safety position of firefighter. None of the successful candidates, including the six (6) ranked below you, had any similar misconduct in their backgrounds and none of the successful candidates provided false statements on their applications.

(Exhibit R2)

26. Under a heading reading “Poor Interview Performance,” the letter stated:

You exhibited unprofessional conduct throughout the interview process. Specifically, you kept your hands in your pockets, showed poor posture and did not demonstrate enthusiasm or interest about the position or in response to the questions you were asked.

The six (6) lower-ranked candidates who were selected in favor of you were all professional and attentive throughout their interviews, and appeared eager to join the Attleboro Fire Department.

(Exhibit R2)

27. On his application, Mr. Jolly stated that he had been accused of stealing “an Amazon delivery package,” which he also referred to as “a package,” that is, one package. (Exhibit R1, p. 14)

28. Mr. Jolly’s application contained a false statement in that he reported having been forced to leave his job for stealing one package, whereas he was forced to leave his job for stealing multiple packages, although an unknown number.

29. Information about the number of packages that Mr. Jolly was accused of stealing is incomplete and uncertain.

30. Information about how a possible police investigation related to the accusation against Mr. Jolly is incomplete and uncertain.

31. Information about whether Mr. Jolly resigned or was fired is in conflict.

32. Mr. Jolly conflated two incidents – arguing with a dockworker, and being forced to leave his job for suspicion of having stolen packages – and he assumed a cause and effect that may not have existed: that he was accused of stealing packages because of his argument with the dockworker.

33. The application apparently tried to learn two things: (A) Had the applicant ever been fired or forced to resign? (B) Had the applicant ever been *disciplined*, short of being fired or forced to resign, such as being suspended, having pay docked, or receiving a written reprimand? However, that is not what the second question asked. It asked whether an applicant had “ever been subjected to disciplinary *proceedings*.” (Exhibit R1, p. 14) (emphasis added).

34. No evidence exists that Mr. Jolly was subjected to disciplinary proceedings.

35. During his interview, Mr. Jolly testified slowly, slouched, kept his hands in his pockets, and answered less enthusiastically than other candidates. (Testimony of Lachance, Exhibit R2)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, citing Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304 (1997). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1. This last standard is the most relevant here: whether the bypass was arbitrary and capricious.

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. Cambridge at 304. This standard is less relevant here, because Deputy Chief Birch was initially inclined to view Mr. Jolly’s candidacy favorably and the City still

bypassed him.

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, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington and another v. McCarthy, 60 Mass. App. Ct. 914, 915 (2004).

Analysis

Number of Missing Packages

In his interview, Mr. Jolly said that he did not know how many packages he had been accused of stealing. (Testimony of Birch)

In the bypass letter, Chief Lachance wrote:

You told the panel that, while employed by a company to deliver Amazon packages, you were unexpectedly called into work early one morning and told that Amazon

Loss Prevention had accused you of stealing packages while you were a delivery driver for R & B Limousine. When asked how they had come to this conclusion, you were unable to provide an answer. You confirmed that you were required to take photographs of each delivery. When asked how many packages were reported missing/stolen, you were unable to provide an answer.

(Exhibit R2)

Mr. Jolly testified at the hearing as follows: He had been accused of stealing multiple packages, but he did not know how many. He met with Amazon's loss prevention manager, who said that he had a list of missing packages. (Testimony of Appellant)

When Deputy Chief Birch telephoned Mr. Ghoneim, Mr. Ghoneim did not know the number of packages that Mr. Jolly had been accused of stealing. (Testimony of Birch)

Apparently, no one connected with the City contacted or tried to contact Amazon's loss prevention manager to find out how many packages Mr. Jolly was accused of stealing and how certain Amazon was that Mr. Jolly had stolen them. Nor was the loss prevention manager called as a hearing witness.

Thus, information about the number of packages that Mr. Jolly was accused of stealing is incomplete and uncertain.

Police Investigation

Chief Lachance wrote in the bypass letter to Mr. Jolly about his interview:

You...told the Panel that you were told that if you didn't resign, that the company would file a police report. Although you claimed that you wanted the police to conduct an investigation, there was no investigation and you promptly resigned from the company.

(Exhibit R2) It is unclear in this account who – Mr. Ghoneim or the loss prevention manager – told Mr. Jolly that if he didn't resign the company would file a police report. It is unclear if Mr. Jolly, while being interviewed, identified the person as Mr. Ghoneim or the loss prevention manager.

Chief Lachance testified about the interview slightly differently: Mr. Jolly said that he had a chance to have a police investigation, but chose not to. (Testimony of Lachance)

Deputy Chief Birch testified about Jolly's interview slightly differently: Jolly said that he had been told to resign or the police would get involved. (Testimony of Birch)

Chief Lachance testified about his telephone conversation with Mr. Ghoneim as follows: Mr. Ghoneim told Mr. Jolly that he could have the police investigate (it is unclear which "he" Chief Lachance referred to: Mr. Ghoneim could have the police investigate or Mr. Jolly could have the police investigate), and if the investigation did not implicate Mr. Jolly, then he might be able to save his job. (It is unclear whether Chief Lachance was reporting that Mr. Ghoneim said that he might be able to save Mr. Jolly's job or that Mr. Jolly might be able to save his own job. It seems more likely that Chief Lachance meant Mr. Ghoneim both times.) However, Mr. Jolly chose to resign. (Testimony of Lachance)

In the bypass letter, Chief Lachance wrote that Mr. Ghoneim stated that Mr. Jolly "could have requested a police investigation to prove your innocence, but you instead chose to resign." (Exhibit R2)

Mr. Jolly testified as follows: When he met with Amazon's loss prevention manager, the manager said that he would get police involved, he would check security cameras, and that Mr. Jolly would be fired. Mr. Ghoneim later called him to fire him. He was not given the option of having the police investigate. (Testimony of Appellant)

Apparently, no one connected with the City contacted or tried to contact Amazon's loss prevention manager to find out what he said to Mr. Jolly or Mr. Ghoneim about a police investigation. Neither Mr. Ghoneim nor the loss prevention manager was called as a hearing witness.

It is hard to determine what Mr. Jolly said at the interview about a police investigation because the interview was not recorded.

Mr. Jolly did not mention a police investigation on his application. Therefore, the bypass letter's references to "false and misleading information" and "false statements on your application" are not related to the police investigation. (Exhibit R2)

Although the bypass letter twice mentioned the police investigation, it is unclear how this issue relates to the bypass.

Chief Lachance seemed to have opined at the hearing that Mr. Jolly's choice not to have a police investigation, which could have exonerated him, together with Mr. Jolly's resignation, may have constituted an admission that he had stolen packages. (Testimony of Lachance) However, it is not clear from conflicting accounts that (A) a police investigation was up to Mr. Jolly to choose; and (B) Mr. Jolly chose not to have the police investigate.

Whether Mr. Jolly resigned or was fired

Chief Lachance wrote in the bypass letter to Mr. Jolly about his interview:

You...told the Panel that you were told that if you didn't resign, that the company would file a police report. Although you claimed that you wanted the police to conduct an investigation, there was no investigation and you promptly resigned from the company.

(Exhibit R2)

Chief Lachance testified about his telephone conversation with Mr. Ghoneim as follows:

Once Amazon Loss Prevention became involved, not much could be done; he would have to fire Mr. Jolly. (Testimony of Lachance, Exhibit R3)

Deputy Chief Birch testified that Mr. Ghoneim told him on the telephone that he had to let Jolly go. (Testimony of Birch)

Mr. Jolly testified that he was fired; he did not resign. (Testimony of Appellant)

Information about whether Mr. Jolly resigned or was fired is in conflict. Even the information from Chief Lachance is in conflict on this point. Mr. Ghoneim may have been able to clarify this issue, but he was not called as a witness.

It is hard to determine what Mr. Jolly said at the interview about resigning or being fired because the interview was not recorded.

Chief Lachance seemed to have opined that Mr. Jolly's resignation, together with Mr. Jolly's choosing not to have a police investigation, may have constituted an admission that he had stolen packages. (Testimony of Lachance) However, it is not clear that Mr. Jolly resigned; he may have been fired.

Findings Related to Argument

The bypass letter recounted that at the interview, Mr. Jolly was asked if he had had any issues or problems with coworkers. He had answered no. (Exhibit R2)

At the hearing, Mr. Jolly testified as follows: He had argued with a dockworker at the Amazon warehouse. The argument was about who was responsible, Mr. Jolly or the dockworker, for folding boxes and putting them on shelves when Mr. Jolly finished his route. Mr. Ghoneim told Mr. Jolly that he understood what had happened and to call him the next time a disagreement happened. The argument was one or two weeks before he was fired. Because of the timing and because the dockworker worked in the same building as the loss prevention manager, Mr. Jolly assumed that the argument had led to the accusation of theft. (Testimony of Appellant)

Chief Lachance testified about his telephone conversation with Mr. Ghoneim as follows: Mr. Ghoneim told him that Mr. Jolly had been involved in two separate incidents. One involved the

allegation of stolen packages. The other was Mr. Jolly's argument with a dockworker at the Amazon warehouse.

Whether Mr. Jolly Had Been Disciplined

No evidence exists that Mr. Jolly was subjected to disciplinary proceedings. Even if Mr. Ghoneim *investigated* Mr. Jolly by reviewing a videorecording of his argument with the dockworker, no evidence exists of a *proceeding*.

Mr. Jolly has *not* argued that he answered "no" to the question about disciplinary proceedings because he was asked about disciplinary proceedings, rather than disciplinary action.

Neither party has discussed that the application asked about disciplinary proceedings, rather than disciplinary action. Both parties' post-hearing submissions assume that the application asked whether Mr. Jolly had ever been disciplined by an employer.

Chief Lachance testified about his telephone conversation with Mr. Ghoneim as follows: Mr. Ghoneim viewed a videorecording of the argument and concluded that Mr. Jolly had been primarily responsible for it. Mr. Ghoneim reprimanded Mr. Jolly for it. (Exhibit R3, Testimony of Lachance)

Because Mr. Ghoneim was not called as a hearing witness, it is hard to determine whether he reprimanded Mr. Jolly or talked to him about the incident in a way that did not amount to a reprimand. It is unknown whether Mr. Ghoneim used the word "reprimand" or Chief Lachance characterized Mr. Ghoneim's followup with Mr. Jolly as a reprimand.

Even if Mr. Ghoneim orally reprimanded Mr. Jolly, it is not clear that Mr. Ghoneim *disciplined* him. A written reprimand is discipline, but it is not clear that an oral reprimand is.

Despite the lack of clarity surrounding this factual issue, the City had legitimate and reasonable reasons, City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010), to bypass Mr. Jolly, partly based on his “no” answer related to discipline. I discuss the legitimate and reasonable reasons below.

Findings Related to Interview Performance

At the hearing, Chief Lachance testified as follows: Mr. Jolly had his hands in his pockets and slouched back in the chair, which Chief Lachance had not previously seen an interviewee do. Mr. Jolly’s speech was slow and his demeanor subdued to the point that interviewers suspected that he was medicated.⁴ When asked about his termination from R & B Limousine, he looked at the ceiling, sighed, and took 15 to 30 seconds to answer. He was not as alert as other candidates. His answers were brief and required interviewers to prompt him; however, that was not unusual with young candidates. (Testimony of Lachance)

At the hearing, Deputy Chief Birch testified that Mr. Jolly had kept his hands in his pockets and slouched during the interview. (Testimony of Birch)

At the hearing, Mr. Jolly testified that he had been nervous at the interview. He did not deny that he had had his hands in his pockets. Rather, he denied remembering that his hands had been in his pockets. He did not testify about whether he had slouched. (Testimony of Appellant)

Reason for the Bypass

The bypass letter cited four reasons. I will discuss them in turn.

⁴ When I asked Chief Lachance why he did not so state in the bypass letter, he testified that it was to protect Mr. Jolly.

Mr. Jolly's forced resignation

As stated, it is unclear whether Mr. Jolly was forced to resign or was fired. The difference is not significant. The City had information that Mr. Jolly was forced to resign, as opposed to being fired, and relied on it when it cited Mr. Jolly's forced resignation in the bypass letter. The significant fact is that Mr. Jolly was forced to stop working at R & B Limousine after having been accused of stealing packages. The City's concern that a firefighter, who would be entering people's homes, was trustworthy and honest was legitimate and reasonable. City of Beverly v. Civil Service Comm'n.

False and misleading statements on Mr. Jolly's application related to his resignation

The City did not specify the false and misleading statements on his application. However, Mr. Jolly reported that he had been accused of stealing one package, whereas he had been accused of stealing multiple packages. That may have been an attempt to minimize his culpability. He also conflated two incidents, the accusation of theft and the argument with a dockworker, and inaccurately ascribed the accusation to the argument. The conflation may have been another attempt to minimize his culpability. Furthermore, he reported the argument on his application, but did not mention it in his interview. Mr. Jolly did not explain these discrepancies.

The City's concerns that a firefighter be able to report events clearly and accurately, without conflating them and incorrectly assuming a relationship between unrelated events, was legitimate and reasonable. City of Beverly v. Civil Service Comm'n.

Failure to "disclose disciplinary action"

It is ultimately not significant that the application asked Mr. Jolly whether he had been subjected to disciplinary proceedings, not disciplinary action, because Mr. Jolly understood the question to be whether he had been disciplined. It is unclear whether Mr. Jolly's employer

disciplined him or even orally reprimanded him. That, too, is ultimately insignificant because Mr. Jolly signed an acknowledgement that his “withholding information...will be the basis for rejection of [his] application” and he solemnly swore before a notary, three times, that “each and every answer is full.” Mr. Jolly did not forthrightly disclose that his employer was displeased with his interaction with a coworker and conveyed his displeasure to Mr. Jolly.

The City wanted to hire a firefighter whom it would not need to discipline. The City inquired, perhaps inartfully, about Mr. Jolly’s history of having been disciplined and Mr. Jolly did not answer either application question forthrightly. This reason for the bypass was legitimate and reasonable. City of Beverly v. Civil Service Comm’n.

Poor interview performance

It would have been preferable if the City had recorded the interview. Mr. Jolly may have been enthusiastic about a firefighter position, but he did not convey it during his interview as effectively as other candidates did. This reason for the bypass was legitimate and reasonable. City of Beverly v. Civil Service Comm’n. I observed him during the hearing, and he was low key and subdued.

Mr. Jolly’s slouching during the interview was a less legitimate and reasonable bypass reason. For the City to bypass a 22-year-old candidate for an entry-level job because he put his hands in his pockets for an undetermined length of time was not legitimate and reasonable. Nonetheless, Mr. Jolly’s overall interview performance, which the City judged was poor, was a legitimate and reasonable bypass reason.

The City has shown that, after conducting a fair and impartial application process, one that was partly conducted by an interviewer who was initially inclined to favor Mr. Jolly’s

application, the City had reasonable justification to bypass the Appellant for appointment as a firefighter. The City was not arbitrary or capricious in bypassing him.

Recommendation of DALA Magistrate

The Civil Service Commission should **deny** the Appellant's appeal.

Kenneth Bresler
Administrative Magistrate

Date: February 18, 2022

Notice:
Daniel M. Rich, Esq. (for Appellant)
Timothy D. Zessin, Esq. (for Respondent)