

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

WILLIAM T. KELLEY,
Appellant

v.

G1-18-055

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

William T. Kelley
150 Salem St. Unit 4
Boston, MA 02113

Appearance for Respondent:

Louis Scapicchio, Esq.
City of Boston
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION

On March 23, 2017, William T. Kelley (Mr. Kelley), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Fire Department (BFD) to bypass him for original appointment to the position of firefighter. On April 17, 2018, a pre-hearing conference was held at the offices of the Commission, which was followed by a full hearing at the same location on June 28, 2018.¹ The full hearing was digitally

¹ 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 received a CD of the proceeding.² On August 10, 2018, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Fourteen (14) Exhibits (Respondents Exhibits 1-11 and Appellant Exhibits A-C) were entered into evidence. Based on the documents submitted and the testimony of the following witnesses:

For the BFD:

- Andrea Hennelly, Director of Human Resources, BFD;
- Registered Nurse (RN) at New England Baptist Hospital;
- Chief Neil Mullane, Chief of Personnel, BFD;

For Mr. Kelley:

- William T. Kelley, Appellant;

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

Background of Mr. Kelley

1. Mr. Kelley is thirty-one (31) years old. He is married and lives with his wife in Boston, Massachusetts. He graduated from Brockton High School in 2005, obtained a Bachelor of Science degree from UMass Boston in 2015 & a Master of Business Administration degree from Boston College in 2018. He has been employed as a mortgage loan officer since 2015.

(Testimony of Mr. Kelley)

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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

2. In 2005, Mr. Kelley enlisted in the United States Marine Corps. During his time of service in the Marine Corps, he was deployed on two (2) occasions. Mr. Kelley obtained the rank of Sergeant while in the Marine Corps and was discharged under honorable conditions in 2012. (Testimony of Mr. Kelley)
3. In 2006, at age 19, Mr. Kelley was deployed to Fallujah, Iraq for seven (7) months where he performed the duties of an infantryman. (Testimony of Mr. Kelley)
4. In 2011, Mr. Kelley was deployed to Jalalabad, Afghanistan for seven (7) months where he performed the duties of Liaison Officer and was responsible for logistical planning of the transportation of personnel and supplies of numerous forward operating bases. (Testimony of Mr. Kelley)

Stipulated Facts

5. In April 2016, Mr. Kelley took the two (2)-part civil service examination for firefighter (written and Entry Level Physical Abilities Test (ELPAT)) and received a score of 98. (Stipulated Fact)
6. As a result of passing the 2016 examination, Mr. Kelley's name appeared on an eligible list of candidates for Boston firefighter, established by the state's Human Resources Division (HRD) on November 4, 2016. (Stipulated Fact)
7. On August 30, 2017, HRD issued Certification No. 04922 to the BFD, from which the BFD eventually appointed forty-five (45) firefighters. (Stipulated Fact)
8. Mr. Kelley was tied for 6th on the Certification, among other disabled veterans. (Stipulated Fact)
9. Two (2) of the candidates appointed were ranked below Mr. Kelley. (Stipulated Fact)

Facts Related to Bypass

10. On December 18, 2017, Ms. Hennelly of the BFD contacted Mr. Kelley, by phone, to notify him that the BFD was extending to him a Conditional Offer of Employment for the position of firefighter with the BFD. (Testimony of Andrea Hennelly)
11. Mr. Kelley's conditional offer required contingencies of "passing the medical examination, the psychological screening component of the medical exam, as well as passing the state's Physical Abilities Test ('PAT')." The offer also states that it is contingent upon available vacancies for the position of firefighter and that "The Boston Fire Department reserves the right to rescind this conditional offer of employment at any time prior to your official appointment should information become available that your selection as a Boston firefighter would not be in the public interest". (Exhibit 1)
12. The hiring process with the BFD has numerous different appointments and deadlines such as medical examinations, psychological examination and interviews, PAT and Practice PAT testing, and uniform fittings. (Testimony of Andrea Hennelly, Mr. Kelley and Exhibit C)
13. Over the next several weeks, Mr. Kelley and a BFD employee exchanged numerous emails regarding the completion of various aspects of the hiring process, including attending medical and other appointments and providing required documentation. (Exhibit C) I have reviewed all of these emails and found all of the emails from Mr. Kelley to be relevant and professional.
14. On December 19, 2017, Mr. Kelley was scheduled for a written psychological exam for the following day, December 20, 2017. (Testimony of Mr. Kelley)

15. On December 20, 2017, Mr. Kelley reported to BFD Headquarters to perform the psych exam. On this date, he also picked up his Medical Examination Packet from Andrea Hennelly and began the medical examination process. (Testimony Mr. Kelley)
16. Within the Medical Examination Packet that Mr. Kelley received, there is a document labeled “Municipality of Boston Fire Candidates”. This document requests that if the candidate is aware of any previous instances of injury that could impact their ability to perform the duties of a firefighter, they request documentation from their treatment provider. This document also notes that the process of obtaining documentation from medical organizations “can take weeks” and that “legally they have a month to furnish them”. (emphasis added) (Exhibit 2)
17. On January 3, 2018, Mr. Kelley was fitted for a uniform. (Testimony of Mr. Kelley)
18. On January 5, 2018, Mr. Kelley participated in a psychological screening interview. (Testimony of Mr. Kelley)
19. Mr. Kelley had his first appointment for medical screening at New England Baptist Hospital on or about January 3, 2018 and his second appointment on January 9, 2018. (Testimony of Mr. Kelley)
20. As part of the medical screening process, candidates are scheduled for two (2) days at New England Baptist. The first day is called “testing day”. During this first day, they are seen by a medical technician and complete blood tests, a stress test, hearing and vision tests, etc. (Testimony of RN)
21. On the second day, candidates are seen by a medical provider (doctor or nurse practitioner) for a physical examination. At this time, candidates may be asked to provide additional medical documentation, verbally and via letter. (Testimony of RN)

22. During the second day, Mr. Kelley was given an “Employee Notification Form” requesting that he provide documents to the medical provider. It states in part: “You note disability for [redacted in original]. Please provide diagnosis and any treatment history and clearance letter to perform (sic) firefighter.” (Exhibit A)
23. On January 9, 2018, Mr. Kelley visited the VA Hospital in Jamaica Plain to request documentation to support his service connected disabilities and request a physical examination be conducted to provide a clearance letter for the position of firefighter. Mr. Kelley was unable to obtain a diagnosis document or a physical exam on that day. (Testimony of Mr. Kelley)
24. Mr. Kelley does not have or maintain a primary care physician at the VA. (Testimony of Mr. Kelley)
25. Mr. Kelley visited multiple medical facilities, some on numerous occasions between the dates of January 9, 2018 and January 30, 2018, to obtain a physical examination and clearance letter to perform the duties of a firefighter. These facilities included the Jamaica Plain VA, a healthcare clinic on Hanover Street in Boston and Mass General Hospital. No medical facility would conduct a physical examination for Mr. Kelley. (Testimony of Mr. Kelley)
26. Mr. Kelley’s healthcare is provided entirely through the VA Healthcare System and he does not have a healthcare provider outside of the VA. (Testimony of Mr. Kelley)
27. Between January 9, 2018 and January 18, 2018, Mr. Kelley signed into his on-line E-Benefits account with the VA. He wrote down his physical service connected disabilities on a loose piece of paper and brought it to the New England Baptist Hospital. (Testimony of Mr. Kelley)

28. Candidates are not required to make appointments to provide additional medical documentation. Rather, they are told to drop in at any time and provide the documentation.
(Testimony of RN)
29. When Mr. Kelley provided the information regarding his disabilities to the RN, he was told this was not the information they were looking for and was reminded of the letter stating that he needed to provide a diagnosis, any treatment and a clearance letter. (Testimony of RN)
30. On January 16, 2018, Mr. Kelley received an e-mail from the BFD stating, “we are nearing the end of our hiring process. We hope to finalize the start date before this week is over.”
(Exhibit C)
31. On January 17, 2018, Mr. Kelley called New England Baptist Hospital and BFD to inquire about his medical clearance. He was told that he was not yet cleared. (Testimony of Mr. Kelley)
32. On January 18, 2018, Mr. Kelley and Andrea Hennelly had a phone conversation. During that conversation, Mr. Kelley stated that he felt that he was being discriminated against due to his status as a disabled veteran. (Testimony of Ms. Hennelly)
33. Between January 18, 2018 and January 30, 2018, Mr. Kelley obtained a copy of his radiology report from the VA and provided it to New England Baptist. He was told that this was not the information that had been requested. (Testimony of RN)
34. On January 30, 2018, Mr. Kelley was able to obtain a physical examination at the VA hospital and a medical clearance letter from the VA. (Testimony of Mr. Kelley)
35. The RN from New England Baptist who interacted with Mr. Kelley on January 30th was subsequently asked to provide a written summary of her interaction that day. The summary states in relevant part:

“Mr. Kelley presented to the New England Baptist Hospital Occupational Health Clinic at approximately 15:30 to provide medical documentation that had been requested on 01/09/2018 by the provider who performed his civil service physical exam. Mr. Kelley then requested I provide ‘something in writing’ stating he was medically cleared that afternoon. I noted his exam was not complete, specifically, I explained his medicals would be reviewed by the Medical Doctor along with the Boston Fire MD. I also explained that this was the same process followed for all candidate charts. Despite this, he continued to insist that he needed ‘something in writing’ informing Boston Fire Department that he ‘did what was asked of him.’ I explained that his request was unorthodox and that the clinic provided clearance information directly to the Boston Fire Department. Mr. Kelley further informed me that if I did not provide what he was requesting, he would be passed by for the position as there was a 9am deadline on Wednesday, January 31, 2018. I called the BFD Human Resource office since I was not aware of this deadline. I spoke to Andrea Hennelly who informed me that the deadline Mr. Kelley spoke of was only for the PAT preview and that another PAT would be offered sometime the following week. I explained this to Mr. Kelley. He then agreed to follow up with the BFD HRD Department the following morning and left the clinic. The entire encounter lasted approximately 45 minutes.” (Exhibit 5)

36. During his interactions with the RN that day, Mr. Kelley was “persistent ... a little demanding ... and frustrated with the process.” (Testimony of RN)
37. The RN never told Ms. Hennelly that Mr. Kelley was rude or disrespectful to her on January 30th nor is there any reference to being rude or disrespectful in the above-referenced written summary. (Testimony of RN and Exhibit 5)
38. On January 31, 2018, before receiving the above-referenced written summary and/or speaking with Mr. Kelley, the RN at New England Baptist was told by the BFD to stop the medical clearance process for Mr. Kelley. (Testimony of RN and Ms. Hennelly)
39. On February 5, 2018, BFD representatives Andrea Hennelly, Chief Scott Malone and Chief Neil Mullane met with Mr. Kelley at BFD Headquarters. Ms. Hennelly was concerned that Mr. Kelley did not apologize for his behavior at New England Baptist on January 30th and Chief Mullane was concerned that Mr. Kelley was “downplaying” the incident and was concerned about Mr. Kelley’s attitude regarding the incident. (Testimony of Ms. Hennelly and Chief Mullane)

40. In a letter from the Fire Commissioner dated February 7, 2018, the BFD rescinded Mr.

Kelley's conditional offer of employment. The rescission letter stated in relevant part:

"It has come to our attention that you have shown a lack of judgment and respect in your interaction with not only our business partners, but also with my staff. You exhibited unacceptable behavior and were uncooperative with our medical provider during the medical phase of the hiring process. Further, you made certain misrepresentations to our medical provider and the Department. This type of conduct is not conducive for one who aspires to be a firefighter. You were offered a chance to explain your conduct. The Department does not find your explanation credible. The Department must be assured that its firefighters display a level of professionalism and respect in their interactions with superior officers, fellow coworkers, business partners, and with members of the public at all times. I do not find that you have done so."

(Exhibit 3)

41. Approximately three (3) months later, on May 25, 2018, the BFD sent a more detailed

"bypass letter" to Mr. Kelley citing his inability to follow instructions in addition to his interaction with the RN at New England Baptist on January 30th. In regard to the latter, the letter states in part: "William, you displayed unacceptable behavior when you demanded documentation from the Baptist that you were not entitled to and failed to leave when you were informed you would not be receiving said documentation." (Exhibit 4)

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. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304. "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, § 1.

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge at 304. Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

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. 814, 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. Beverly. 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.

Analysis

In regard to whether the BFD has provided valid reasons for bypass, I give no weight or consideration, nor have I referenced in this decision, those exhibits and/or testimony related to any non-medical related negative factors identified by the BFD *prior* to issuing him a conditional offer of employment. After a thorough background investigation, the BFD ultimately decided to

issue Mr. Kelley a conditional offer of employment, subject to passing medical and physical examinations.

As stated in DuVal v. City of Somerville, 30 MCSR 447 (2017):

“It is a crucial tenet within basic merit principles under civil service law to assure, among other things, “fair treatment of all applicants and employees in all aspects of personnel administration without regard to . . . handicap . . . and with proper regard for privacy” G.L.c.31, §1. Both the federal Americans With Disabilities Act, 42 U.S.C. §§12112(d)(2)-(3), and the Massachusetts Employment Discrimination Law, G.L.c.151B, §4(16), strictly regulate how employers may acquire and use private, medical information about a candidate for employment, essentially, precluding inquiry into a candidate’s medical history without first having made a bona fides, i.e., “real”, offer of employment based on an evaluation of “all relevant non-medical information.” See, e.g., Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 682,n.5 (2012); O’Neal v. City of New Albany, 293 F.3d 998, 1007-1009 (7th Cir. 2002); Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d 130, 137-39 (D. Mass. 1998), *citing*, “ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations”, (EEOC Notice 915.002 October 10, 1995); Massachusetts Commission Against Discrimination, “Guidelines; Employment Discrimination on the Basis of Handicap-Chapter 151B”, §IV & §V, <http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-handicap-gen.html>

The duty to compartmentalize medical and non-medical employment decision-making stems from the statutory mandate to minimize the risk of cross-contamination between these two separate issues, which can be a very illusive matter to prove after-the-fact. See, e.g., O’Neal v. City of New Albany, 293 F.3d at 1008, *citing* McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995) (“proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.”); Garlitz v. Alpena Reg. Med. Ctr., 834 F.Supp.2d 668, 677 (E.D. Mich. 2011) (“The obvious purpose of [42 U.S.C. §12112(d)(2)] is to limit the gathering and use of medical information as one of the ways to reduce the possibility of discrimination.”); Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d at 141 (“The distinction between what may be asked in the pre-and post-offer stages is designed to facilitate discovery of discrimination.”)”

Applied here, once the BFD began accessing Mr. Kelley’s medical information, including medical information related to his disability rating with the VA, it was precluded from effectively changing its mind regarding whether or not the non-medical issues, of which it was already aware pre-conditional offer of employment, justified a decision to bypass Mr. Kelley for appointment.

I have, however, concluded that certain events that occurred during the “pre-conditional offer phase” of the hiring process ultimately played a role in the decision to bypass Mr. Kelley for the following reasons. Ms. Hennelly is the BFD’s Director of Human Resources. She is an experienced professional who takes her job, and her testimony before the Commission, seriously. Ms. Hennelly testified that, notwithstanding some negative factors on Mr. Kelley’s background investigation, she personally advocated for Mr. Kelley’s appointment. Having reviewed the entire record, and carefully listening (and re-listening) to relevant testimony, it is clear that Ms. Hennelly was personally offended by Mr. Kelley’s suggestion, during a phone conversation in mid-January, that Ms. Hennelly was discriminating against him because of his disabled veteran status. In short, notwithstanding her well-demonstrated professionalism, I believe that Ms. Hennelly allowed Mr. Kelley’s confrontation with her to adversely influence her better judgment and, ultimately, caused her and the BFD to cloud what actually occurred between Mr. Kelley and the RN at New England Baptist on January 30th.

I accept Mr. Kelley’s testimony that: a) as a disabled veteran, he received his medical care through the VA; b) he was unable to quickly schedule an appointment with a VA medical professional to provide a “diagnosis, any treatment history and a clearance letter” regarding a medical disability; and c) he made multiple unsuccessful attempts to find a non-VA medical professional to do the same; and d) with a deadline fast approaching, he was finally able to get an appointment at the VA on January 30th to provide the required medical information. It is against *that* backdrop, that Mr. Kelley, who is employed full-time, stopped by New England Baptist and dropped off the required information that he had just obtained from the VA. When he asked the RN if a doctor could review the information and give him medical clearance that day, he was told that couldn’t happen at least in part, because it was a busy day in the office. He told the RN

he didn't mind waiting, informed her of a pending deadline and took a seat in the lobby. Although, in retrospect, Mr. Kelley probably should have taken a different tact that day (i.e. - just asking for some type of written confirmation that he delivered the information in-hand), the evidence does *not* show that he "displayed unacceptable behavior" was "disrespectful" or, when viewed in the proper context that he "refused to leave". Importantly, the RN who interacted with Mr. Kelley that day did not believe he was rude nor did she feel the need to file (formally or informally) a complaint with the BFD regarding Mr. Kelley's behavior that day. Rather, she candidly acknowledged during her testimony that Mr. Kelley's "persistence" and "somewhat demanding" language appeared to be driven primarily from his frustration with the overall process.

Less than twenty-four (24) hours later, prior to hearing from Mr. Kelley, and prior to receiving a written summary from the RN, the BFD instructed New England Baptist to terminate the medical review of Mr. Kelley, effectively ending a process that began for Mr. Kelley approximately two (2) years prior, when he took and passed the two-part civil service examination for firefighter, receiving a score of 98. The BFD's hasty decision here was unwarranted, based on incomplete information and, as referenced above, appeared to be driven by a personal animus against Mr. Kelley. To me, it also suggests that the decision to rescind Mr. Kelley's appointment was made prior to calling him in to meet with BFD officials and prior to reviewing the RN's written summary.

Again, when viewed in the proper context, the evidence does not support the BFD's other reasons for bypass in which they argue that Mr. Kelley did not follow instructions and/or that he made misstatements. In regard to the latter, there is no doubt that, on January 30th, the clock was ticking. A PAT preview, or the deadline for attending it, was going to occur the next day and

Mr. Kelley felt pressed for time, in part because of the delays beyond his control that he had encountered with the VA. While Ms. Hennelly told the RN that a second PAT, or PAT preview (it is unclear which) would take place the following week, It doesn't appear that Mr. Kelley had been made aware of that by the BFD. Thus, I don't find his statement to the RN that there was a January 31st deadline to be a misrepresentation or to be untruthful. Rather, it appears to be a misunderstanding about a very complex hiring process. For the same reasons, I have not found that Mr. Kelley has an inability to follow instructions. To the contrary, his extensive educational and military record and employment as a mortgage loan officer are indicative of the opposite.

Conclusion

For all of the above reasons, Mr. Kelley's appeal under Docket No. G1-18-055 is hereby allowed. Pursuant to Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

- I. The state's Human Resources Division shall place the name of William T. Kelley at the top of the next Certification for permanent, full-time firefighter in the Boston Fire Department until such time as he is appointed or bypassed.
- II. Should Mr. Kelley be appointed, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 04922.
- III. This retroactive civil service seniority date is for civil service purposes only and is not intended to provide Mr. Kelley with any additional compensation or other benefits, including creditable time for retirement purposes.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners) on December 20, 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)(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 To:

William T. Kelley (Appellant)
Louis Scapicchio, Esq. (for Respondent)
Mark Detwiler, Esq. (HRD)
Regina Caggiano (HRD)