

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

STEVEN LAZAZZERO,
Appellant

v.

**CITY OF
MARLBOROUGH,**
Respondent

Case No.: G1-12-289

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. The parties had thirty (30) days to provide written objections to the Commission.

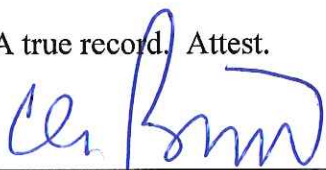
The Commission received and reviewed the Tentative Decision of the Magistrate dated November 5, 2013. No written objections were received.

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 Appointing Authority to bypass the Appellant is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 9, 2014.

A true record. Attest.



Christopher C. Bowman
Chairman

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:

David Brody, Esq. (for Appellant)

Donald Rider, Jr., Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
1 Congress Street, 11th Floor
Boston, MA 02114
www.mass.gov/dala

Stephen P. Lazazzero,
Appellant

v.

CSC Docket No. G1-12-289
DALA Docket No. CS-13-197

City of Marlborough,
Appointing Authority

Appearance for Petitioner:

David Brody, Esq.
Law Office of Joseph L. Sulman, Esq.
185 Devonshire Street
Suite 502
Boston, MA 02110

Appearance for Respondent:

Donald V. Rider, Jr., Esq.
City Solicitor
Legal Department
City of Marlborough
140 Main Street
Marlborough, MA 01752

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF RECOMMENDED DECISION

The City of Marlborough had reasonable justification to bypass the petitioner for the position of firefighter. The reasons for which he was bypassed do not apply equally to the candidates for whom he was bypassed. I therefore recommend that the Civil Service Commission dismiss the appeal.

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CIVIL SERVICE COMMISSION

RECOMMENDED DECISION

The appellant, Stephen P. Lazazzero, appeals the decision of the City of Marlborough to bypass him for the position of intermittent firefighter.

I held a hearing on April 4 and June 13, 2013, which I recorded digitally. Mr. Lazazzero testified, and called no other witness. James Fortin, Chief of the Marlborough Fire Department; Shawn Brecken, a firefighter with the Malden Fire Department; and Detective Robert Bonina of the Marlborough Police Department testified for the City of Marlborough.

I accepted into evidence 30 exhibits. Both parties submitted post-hearing briefs.

Findings of Fact

1. Mr. Lazazzero was a 25-year-old resident of Marlborough when he began his application process for a position as a Marlborough firefighter in August 2012. (Ex. 2.)
2. In late August 2012, Chief Fortin met with Mr. Lazazzero and other candidates for 20 to 30 minutes. (Fortin testimony.)
3. Mr. Lazazzero and the other applicants sought positions as intermittent firefighters, which is comparable to being on a reserve list. (Fortin testimony.)
4. At the late August 2012 meeting, Mr. Lazazzero and the other candidates received application packages. (Fortin testimony.)
5. Chief Fortin told Mr. Lazazzero and the other candidates to be truthful during the process and that he did not want to see any surprises on the application packages. (Fortin testimony.)
6. Stephen P. Lazazzero signed the Employment Application Package to become a firefighter for the Marlborough Fire Department on or about August 27, 2012. (Ex. 2.)

7. The Employment Application Package was 50 pages long; Mr. Lazazzero added two pages of extended answers to six questions in the package. (Ex. 2).

8. On September 24, 2012, Marlborough sent Mr. Lazazzero a bypass letter, listing several justifications. (Ex. 5.) This decision finds the underlying facts related to the justifications and then returns to the bypass letter.

9. On May 6, 2004, Mr. Lazazzero was involved in an incident that resulted in a Marlborough Police Department report. (Ex. 19.)

10. On May 6, 2004, a Marlborough police officer responded to the local McDonald's restaurant for a disturbance. There, he learned that Mr. Lazazzero had punched a trash receptacle, breaking part of it. Mr. Lazazzero told the officer that four males had approached him and an argument broke out. When the restaurant asked the men to leave, Mr. Lazazzero punched the receptacle in anger. He agreed to fabricate a new part for the receptacle. The officer agreed not to file charges if Mr. Lazazzero fabricated the part. (Ex. 19.) (Later, the bypass letter listed 5/6/04 as among the occasions that "may reflect self control issues." (Ex. 5.))

11. On January 4, 2005, Mr. Lazazzero was involved in an incident that resulted in Marlborough Police Department reports. (Ex. 18.)

12. On January 4, 2005, a Marlborough police officer responded to a report of a domestic disturbance at Mr. Lazazzero's home. His mother told the officer that she had been in an argument with Mr. Lazazzero, who has been rude and disrespectful to both parents. She reported that Mr. Lazazzero had been in the bathroom looking for a medication for a friend, and she asked him to come out. Mr. Lazazzero began swearing, lost control, and threw a recliner in the living room against the wall. (Ex. 18.) (Later, the bypass letter listed 1/4/05 as among the occasions that "may reflect self control issues." (Ex. 5.))

13. On January 29, 2005, Mr. Lazazzero was involved in an incident that resulted in Marlborough Police Department reports. (Ex. 10.)

14. On January 29, 2005, at approximately 10:45 p.m., Marlborough police officers arrived at a Bertucci's restaurant. The report stated:

[T]he reporting party, Steve Lazazzero....explain[ed] he was driving westbound on Boston Post Road when a second vehicle, a late model red Chevy Blazer, pulled up very close to his rear bumper. When he slowed, the vehicle pulled to his right hand side. The operator rolled down his window and began yelling obscenities at Mr. Lazazzero. Mr. Lazazzero admits he rolled his window down and exchanged words with the occupants of the Blazer. At this time, Mr. Lazazzero reports the passenger of the second vehicle "pointed something dark in color" in his direction. Mr. Lazazzero felt threatened because he thought it was probably a weapon so he sped off in a westerly direction. He reports the red Blazer turned off onto Dickenzo Blvd.

(Ex. 10, p. 4)(typographical and punctuation errors corrected.)

15. If Mr. Lazazzero told the police that he knew the passenger in the second car, it does not appear in the police report (Ex. 10) and was not the subject of testimony.

16. Marlborough police officers located the second vehicle on Dickenzo Blvd. The driver admitted that he had been involved in a road rage incident with the first vehicle. The second vehicle's passenger knew Mr. Lazazzero. (Ex. 10, p. 4.) The passenger reported that the incident began when the driver "was just fooling around by tailgating" Mr. Lazazzero. (Ex. 10, p. 6.)

17. The interview with the occupants of the second vehicle eventually led to their arrest for possession of marijuana and a search of the vehicle. No weapon was located. (Ex. 10, pp. 3, 5.) (Later, the bypass letter referred to "Road rage incident, disturbance call – Marlborough, Ma. 1/29/07." (Ex. 5.))

18. On December 23, 2005, Mr. Lazazzero was involved in an incident that resulted in a Marlborough Police Department report. (Ex. 16.)

19. On December 23, 2005, at approximately 1:15 a.m., a Marlborough officer saw a vehicle, which he later determined was driven by Mr. Lazazzero, driving 76 miles per hour (as clocked on radar) in a 40 mile-per-hour zone. The officer turned around and followed the vehicle. Approximately an eighth-mile away, the officer saw skid marks over the double-yellow line. The skid marks led to Mr. Lazazzero's vehicle, which was on the front lawn of a house and which had avoided hitting the house by inches. Mr. Lazazzero was standing near the driver's side of the vehicle. The officer saw a person run from the passenger's side. (Ex. 16.)

20. Mr. Lazazzero apologized for "being stupid." The officer smelled a slight alcoholic odor emanating from Mr. Lazazzero, who admitted to having consumed two beers and who passed a field sobriety test. When the officer asked who had run from the vehicle, Mr. Lazazzero said that he had been alone. When the office pointed out fresh footprints in the snow, Mr. Lazazzero identified the passenger. (Ex. 16.)

21. The officer located a beer bottle under the front passenger seat. He issued a criminal complaint to Mr. Lazazzero for driving to endanger; speeding; marked lanes violations; and having an open container of alcohol in his car. Mr. Lazazzero was not arrested. (Ex. 16.) (Later, the bypass letter referred to "Speeding – Marlborough, Ma. 12/23/05." (Ex. 5.))

22. On April 1, 2006, the Marlborough police arrested Mr. Lazazzero. (Ex. 15.) The police report relates that an officer was dispatched at approximately 11:35 p.m. to Mr. Lazazzero's home for a domestic disturbance in progress. There, the officer spoke to Mr. Lazazzero's parents. The report continued:

They informed me that their son, Steven, was involved in a verbal argument with his girlfriend. As a result, Mr. [Paul] Lazazzero approached his son and a verbal argument ensued between...them...Steven grabbed his father and threw him down on the bed and...pinned him....Mrs. Lazazzero came to her husband's aid and grabbed her son by the back of the shirt and pants. Steven then let up and told his

mother to let go because he did not want to hit her. Steven then let go of his father and took off from the residence.

According to both parents, Steven has a rage problem, [and is] extremely disrespectful and very destructive. Mr. [Paul] Lazazzero showed [the officer] where [Steven] had punched holes in the wall, broken doors and destroyed personal property....[They] informed [the officer] that this is the third time Steven has laid hands on his father.

(Ex. 15.)

23. Then-Officer Bonina located Steve Lazazzero, arrested him, transported him to the police station, and booked him. There, the officer smelled a slight alcoholic odor emanating from Mr. Lazazzero. He also asked if Mr. Lazazzero had pushed his father down. “[H]e replied with a smirk, ‘Yeah.’” (Ex. 15.) (Later, the bypass letter referred to “Assault & battery – Marlborough, Ma. 4/1/06 (no charges filed)” and listed this date as among the occasions that “may reflect self control issues.” (Ex. 5.))

24. On April 1, 2006, after a Marlborough police officer had arrested Mr. Lazazzero for domestic assault, the officer learned that Mr. Lazazzero’s driver’s license had been revoked. During Mr. Lazazzero’s booking, two officers discussed the revoked status of his license with him and showed him a printout of his Registry of Motor Vehicles history. (Ex. 14.)

25. On April 4, 2006, the Marlborough police officer who had arrested Mr. Lazazzero three days earlier saw him driving a vehicle. The officer asked him why he was driving. Mr. Lazazzero answered that his license was all set and that his lawyer had taken care of it. Despite Mr. Lazazzero’s assurance, his license remained revoked, and he was arrested. (Ex. 14.) (Later, the bypass letter referred to “License revoked – 4/6/06.” (Ex. 5.))

26. On July 22, 2006, Mr. Lazazzero was involved in an incident that resulted in a Hudson Police Department report. (Ex. 13.)

27. On July 22, 2006, around 4:15 p.m., Hudson police officers saw two men, a gas station employee and Mr. Lazazzero, arguing in public. Mr. Lazazzero got into his vehicle and drove away. The gas station employee told the officers that he had told Mr. Lazazzero that he had made an illegal left turn; in response, Mr. Lazazzero jumped out of his vehicle and began arguing. When the officers located Mr. Lazazzero's vehicle, he told them that he became angry when the gas station employee had criticized his driving. He apologized. The officers told Mr. Lazazzero "to call the police if he has a problem and not take matters into his own hands." (Ex. 13.) (Later, the bypass letter referred to "Road rage incident, disturbance call – Hudson, Ma. 7/22/06." (Ex. 5.))

28. On September 24, 2006, Mr. Lazazzero was involved in an incident that resulted in a Marlborough Police Department report. (Ex. 17.)

29. The incident involved Sarah Thornton, with whom Mr. Lazazzero had once lived, when they were teenagers, at his parents' home. (Lazazzero testimony.) On September 24, 2006, Mr. Lazazzero and Ms. Thornton had broken up, or at least had done so in her eyes. She had gone to the movies with a man whose initials are JS. Mr. Lazazzero went to JS's house, where Ms. Thornton was present, and had reportedly banged on the door, demanded to speak to Ms. Thornton, and caused a disturbance. (Ex. 17.)

30. When a police officer arrived at JS's house, Mr. Lazazzero flagged him down and demanded that he get his girlfriend from the house. Mr. Lazazzero was hyperventilating and on the verge of crying. When the officer went to speak to people in JS's house, Mr. Lazazzero continued "his bizarre behavior"; while in the driveway, he cried and demanded to speak with Ms. Thornton. (Ex. 17.)

31. Ms. Thornton agreed to speak with Mr. Lazazzero, apparently outside; he dropped to his knees, hugged Ms. Thornton, cried, and begged her to return to his home. (Ex. 17.)

32. The officer advised Mr. Lazazzero not to trespass at JS's house. (Ex. 17.)

33. JS and a woman on the scene told the officer that Mr. Lazazzero was possessive and had control issues involving Ms. Thornton, and that the two have broken up several times. (Ex. 17.) (Later, the bypass letter listed 9/24/06 as among the occasions that "may reflect self control issues." (Ex. 5.))

34. On New Year's Eve, December 31, 2006, Mr. Lazazzero was involved in an incident that resulted in a Marlborough Police Department report. (Ex. 12.)

35. On December 31, 2006, at approximately 10:40 p.m., a Marlborough police officer responded to Edinboro Street for a report of a person setting off fireworks in the street. The officer also had seen fireworks exploding in the sky and upon arriving at Edinboro Street, saw the remnants of a fireworks launcher. (Ex. 12.).

36. On Edinboro Street, the officer spoke with two people

who state they have been receiving calls from Steven Lazazzero wishing that they join him in New Year festivities. They did not answer the phone as both [people] are attempting to disassociate themselves with him as he is "the wrong crowd" due to drinking and drug use.

The two people saw a vehicle, which they recognized as his, drive by; and saw him put a box in the street, light it, and run away.

A few minutes later, [the man] received multiple phone calls on his cell phone again from Lazazzero. Lazazzero left one message that caused [the two people] to call MPD. Lazazzero stated in the message that he "wasted a firework" and that he'd "be back with a bigger one if you don't start picking up your phone." [The man] states that Lazazzero "loves" fire and describes him as a "pyro" and has experimented with gasoline in the past.

(Ex. 12.) (Later, the bypass letter referred to “Harassing phone calls – Marlborough, Ma. 12/31/06” (Ex. 5.) It did not refer to the fireworks or allegations about Mr. Lazazzero’s relationship with fire.)

37. On November 5, 2007, Mr. Lazazzero was involved in an incident that resulted in a Marlborough Police Department report. (Ex. 11.)

38. On November 5, 2007, after 10:00 p.m., a Marlborough police officer was parked in a gas station parking lot when he saw a pickup truck leave the parking lot by accelerating quickly, causing the tires to squeal. The officer later determined that Mr. Lazazzero was the driver. The officer followed in his vehicle, Mr. Lazazzero accelerated, and the officer turned on his emergency lights. (Ex. 11.)

39. The report does not specify that Mr. Lazazzero did not pull over in response to the emergency lights, but neither does it report that Mr. Lazazzero pulled over. (Ex. 11.)

40. Mr. Lazazzero turned off his headlights while still driving on a public street. The report does not specify or speculate that he did so to evade the police officer. (Ex. 11.)

41. Mr. Lazazzero quickly pulled into a driveway, which may have been his or a neighbor’s. (Ex. 11, p. 2 (Lazazzero pulled into 38 Sawin St.), p. 1 (Lazazzero lived at 40 Sawin St.)) He and the officer both got out of their vehicles. The officer ordered him back into his vehicle. Mr. Lazazzero refused. The officer ordered him again, Mr. Lazazzero again refused, and the officer handcuffed him. (Ex. 11.)

42. Although Mr. Lazazzero was handcuffed and may have been arrested, he was apparently not charged, because the bypass letter referred to “Disorderly conduct – 11/5/07 (no charges filed).” (Ex. 5.)

43. On August 30, 2009, Mr. Lazazzero was involved in an incident that resulted in a Marlborough Police Department report. (Ex. 9.)

44. On August 30, 2009, at approximately 12:24 a.m., Marlborough police officers arrived at the Lazy Dog, a bar, where at least one officer met with Mr. Lazazzero in front. The report continued:

[T]wo females...stated Mr. Lazazzero approached them several times and was annoying. He kept on touching [one woman]'s hat and was asked to leave them alone. He left and then a little while later came back and repeated thing[s] and then started to drink their drinks. The bouncers were called over and asked Mr. Lazazzero to leave the premises. Mr. Lazazzero refused to leave and a scuffle ensued. Mr. Lazazzero was asked not to return for the night and left with his mother.

(Ex. 9.)

45. The incident report has the notation "No Crime Involved." (Ex. 9.) (Later, the bypass letter referred to "Disturbance while intoxicated – Marlborough, Ma. 8/30/09." (Ex. 5.))

46. On February 2, 2012, Detective Bonina telephoned Mr. Lazazzero and told him that he had been "identified as a person of interest involving the possession of stolen property." (Ex. 8, Bonina and Lazazzero testimony.)

47. Mr. Lazazzero told Detective Bonina that he was willing to speak with him, but that he wanted his lawyer present. (Ex. 8, Bonina and Lazazzero testimony.)

48. On February 13, 2012, a meeting occurred among Mr. Lazazzero; his lawyer, Adam Kretowicz; and Detective Bonina. (Ex. 8, Bonina and Lazazzero testimony.)

49. At the beginning of the February 13, 2012 meeting, Detective Bonina told Mr. Lazazzero that he was not under arrest and would not be arrested during the interview. (Ex. 8.)

50. At the February 13, 2012 meeting, Detective Bonina stated that he was investigating stolen property, specifically snowplows, and Mr. Lazazzero's "name had surfaced as a person

possibly being in possession of a stolen Fisher snow plow.” (Ex. 8, Bonina and Lazazzero testimony.)

51. Approximately three to four months before the meeting, Mr. Lazazzero happened to meet a man whom he knew at Home Depot, which resulted, two days later, in Mr. Lazazzero’s purchase from the man of a used eight-foot-long Fisher snowplow.

52. Among Mr. Lazazzero’s sources of income was plowing snow. (Lazazzero testimony.)

53. Mr. Lazazzero purchased the snowplow for \$1,500 cash. No receipt exists for the transaction. (Ex. 8, Lazazzero testimony.)

54. Detective Bonina completed an incident report about the snowplow on or after April 2, 2012. (Ex. 8, p. 4 (last date reference is “4/02/2012”).)

55. The first page of the incident report refers to the snowplow’s seller as a suspect. The second page refers to Mr. Lazazzero as a victim. (Ex. 8.)

56. The incident report listed Mr. Lazazzero as a victim because of the limitations of the software; Detective Bonina could not list both the seller and Mr. Lazazzero as suspects. (Bonina testimony.)

57. Detective Bonina’s incident report reads in part:

...Mr. Lazazzero admitted he made several modifications to the plow since he purchased it.

The upgrades included a fresh coat of yellow paint, a new electric motor, rubber wind deflector, back drag, new plow edge and a Fisher decal applied to the inside of the plow, he also illuminated the two side markers after they were damaged....I suspect that based upon Mr. Lazazzero’s numerous modifications of the plow, it may be impossible to expect the prior owner/victim to be able to identify the plow in its current condition.

I am also concerned that the upgrades Mr. Lazazzero made were made to permanently change the appearance of the plow after he purchased it. The electric

motor that was replaced contained one of two traceable serial numbers, the second serial # is placed on the plow and appears to have been removed although there is clear evidence still present w[h]ere the sticker once was.

(Ex. 8.)

58. Detective Bonina was investigating Mr. Lazazzero for receiving stolen property. He did not explain to Mr. Lazazzero what "person of interest" meant. He did not tell Mr. Lazazzero that Mr. Lazazzero was a suspect or under investigation. (Bonina testimony.)

59. Detective Bonina believes that in telephone conversations with Mr. Lazazzero's lawyer without Mr. Lazazzero on the telephone, he conveyed to Mr. Kretowicz that he was investigating Mr. Lazazzero. (Bonina testimony.)

60. Mr. Lazazzero received a copy of Detective Bonina's report in late August or early September 2012. (Stipulation.) He had it when he filled out the Employment Application Package. (Ex. 6.)

61. The Employment Application Package asked Mr. Lazazzero:

To the best of your knowledge, are you currently, or have you ever been, under investigation by any local, state, county, federal or foreign law enforcement agency?

Mr. Lazazzero answered no. (Ex. 2, p. 24.) (This decision refers to the question as Question 3.)

62. The Employment Application Package instructed:

All questions must be answered truly and correctly....Willfully withholding information or making false statements on this for will be the basis, by itself, for rejection of the application....

(Ex. 2, p. 3.)

63. As part of the Employment Application Package, Mr. Lazazzero signed these statements: "...I am aware that...making false statements on this application will be the basis for rejection of my application...." and

...I hereby certify that all statements made by me on this application are true and complete to the best of my knowledge.

(Ex. 2, p. 5.)

64. As part of the Employment Application Package, Mr. Lazazzero also signed this statement:

I hereby certify...that my statements on this Form...are true, correct and complete to the best of my knowledge and belief and are made in good faith; and that I am aware that willfully withholding information or making any false statements can lead to rejection of my application....

(Ex. 2, p. 48.)

65. The printed part of the Employment Application Package ended with:

Warning: If it is determined that any of the application information is untruthful, you will automatically be disqualified from further consideration....A false or incomplete answer to any question in this application may be grounds for not employing you....

(Ex. 2, p. 50.)

66. As part of Mr. Lazazzero's application process to the Marlborough Fire Department, he met with Mr. Brecken, who conducted his background investigation. (Brecken testimony.)

67. Chief Fortin concluded that Mr. Lazazzero's mischief and activity involving the police made it unwise to hire him for the Marlborough Fire Department. (Fortin testimony.)

68. On September 24, 2012, Chief Fortin sent Mr. Lazazzero a bypass letter, most of which is quoted below:

Based on the investigation you were found to be unsuitable for selection as a Firefighter as you do not exhibit the qualities of a public safety employee.

- Applicant was not truthful with his answer to question 3 on page 24 in his application package. Applicant failed to admit that he was under investigation for possession of stolen property in February 2012.

Background History:

- Possession of stolen property – Marlborough, Ma. 2/13/12
- Surchargeable accident – Hudson, Ma. 10/27/11
- Surchargeable accident – Weston, Ma. 9/1/11
- Disturbance while intoxicated – Marlborough, Ma. 8/30/09
- Road rage incident, disturbance call – Marlborough, Ma. 1/29/07
- Disorderly conduct – 11/5/07 (no charges filed)
- Harassing phone calls – Marlborough, Ma. 12/31/06
- Road rage incident, disturbance call – Hudson, Ma. 7/22/06
- License revoked – 4/6/06
- Assault & battery – Marlborough, Ma. 4/1/06 (no charges filed)
- Speeding – Marlborough, Ma. 12/23/05

There have also been numerous occasions that resulted in Marlborough Police investigation which may reflect self control issues:

- 9/24/06
- 1/4/05
- 5/6/04
- 4/1/06

Based on the results of the preliminary interview and extensive background investigation, this Department is requesting a non-selection bypass. You do not appear to possess respect for the laws that the public should expect from public safety personnel. You have also demonstrated a pattern that could be considered a liability to the City of Marlborough to hire as a Firefighter.

(Ex. 5.)

Other candidates

69. On November 5, 2012, Marlborough selected five candidates, not including Mr. Lazazzero, to become permanent intermittent firefighters. Their initials are JC, BA, KH, JA, and JR. (Ex. 3.)

70. JC, JA, and JR had relatives in the Marlborough Fire Department. (Fortin testimony.)

71. Nothing in JA's background caused concern to the Marlborough Fire Department.

(Fortin testimony.)

72. JR had committed trespassing when he was a minor. (Fortin testimony.)

73. Chief Fortin did not converse with JC's, JA's, or JR's relatives who were employed by the Marlborough Fire Department about the candidacies. (Fortin testimony.)

Other candidates: JC

74. JC had two relatives working in the Marlborough Fire Department, one a deputy chief, one a firefighter. (Fortin testimony.)

75. On January 14, 2008, Marlborough police officers in at least two cruisers responded to a report of a four-wheel all-terrain vehicle (ATV) being driven on a public street. They later learned that the operator was JC. It had snowed heavily and the streets were snowy and icy. (Ex. 25, p. 20, 21.)

76. An officer in one cruiser signaled to JC to pull over. JC looked at the police officer, and instead of stopping, accelerated. (Ex. 25, p. 21.)

77. JC sped toward a second cruiser, which activated its blue lights. JC braked suddenly, and tapped the cruiser's license plate with the ATV. JC then went around the cruiser, driving in the wrong side of the street. JC continued driving on the wrong side of the street and after entering an intersection, drove on the wrong side of a traffic island. (Ex. 25, p. 20, 21.) (Despite the report of JC's ATV tapping the cruiser's license plate, JC did ultimately pay restitution, indicating damage. (Ex. 25, p. 11.))

78. When the police had identified and contacted JC, he came to the police station, received his *Miranda* rights and admitted to the following: He had been driving the ATV, had slid into the cruiser, had become scared, had fled, and had driven on the wrong side of the street and traffic island. (Ex. 25, p. 22.)

79. JC received a criminal complaint and citation for leaving the scene of a motor vehicle accident, operating an uninsured vehicle on a public street, operating an uninsured recreational vehicle, operating a recreational vehicle to endanger, and failing to keep right. (Ex. 25, p. 22.)

80. JC received continuations without findings for three charges on which he was arraigned on August 7, 2008: leaving the scene after causing property damage, not having compulsory insurance, and possessing marijuana. (Ex. 25.) (The first two charges were apparently related to JC's ATV incident on January 14, 2008.)

81. JC received continuations without findings on the following charges in juvenile court, for which he was arraigned on August 19, 2004: possessing marijuana and being a minor in possession of alcohol. (Ex. 25.)

82. JC received continuations without findings on the following charges in juvenile court, for which he was arraigned on February 24, 2004: making threats; being disorderly; disturbing the peace; and trespassing. (Ex. 25.)

83. In his Employment Application Package, JC reported two surchargeable accidents, one on July 30, 2007 and one on June 3, 2010; and two minor accidents, without dates (Ex. 25.) The surchargeable accidents appear on his driving record. (Ex. 25.)

84. In his Employment Application Package, JC reported a traffic citation or citations for improper passing (switching lanes without signaling); speeding; and failure to stop (making an incomplete stop) on unspecified dates. (Ex. 25.)

85. JC's driving record reveals citations and/or complaints for speeding on August 30, 2004; speeding and two unspecified traffic violations on March 20, 2005; operating an unregistered vehicle and/or one with improper equipment on April 10, 2005; driving to endanger, and driving a vehicle without an inspection sticker and with improper equipment on November

22, 2006; improper passing on October 6, 2007; driving a recreational vehicle dangerously and driving an unregistered recreational vehicle on January 14, 2008; speeding and driving without a seatbelt on April 29, 2009; speeding on July 14, 2010; and failure to stop on November 2, 2010. (Ex. 25.) (The apparent discrepancies between the driving offenses that JC revealed in his Employment Application Package and the offenses on his driving record was not noted or explained during the hearing or in submissions.)

86. Chief Fortin viewed the ATV incident as an indiscretion of JC's youth and not a disqualifier for employment. (Fortin testimony.)

87. Chief Fortin viewed JC's involvement with police as having ended about three years before his application to the Marlborough Fire Department. (Fortin testimony.)

Other candidates: BA

88. On March 16, 2003, BA received criminal complaints for operating a recreational vehicle without a license and operating an unregistered recreational vehicle on a public street. (Ex. 24.)

89. In his Employment Application Package, BA stated:

My employment with American Medical Response was terminated in June 2010 due to my EMT certification being suspended for nine months from June 1[,] 2010 until March 1[,] 2011[,] when I completed my EMT refresher and my certification was re-activated. My EMT certification was suspended for failing to complete a refresher course. My EMT certification is current and up to date with all my training standards.

(Ex. 24.)

90. BA had been suspended as an EMT because he, among many other EMTs, had falsely reported attending a recertification course. (Brecken testimony.)

91. On his Employment Application Package, BA did not report having been under investigation. (Ex. 23; Brecken testimony.)

Other candidates: KH

92. On his Employment Application Package, KH checked off that he had used marijuana and amphetamines. He told Mr. Brecken that he no longer used these drugs; he had used them when he was immature and associating with the wrong crowd; he had put that part of his life behind him; and that he had moved from California to make a better life for himself. (Ex. 23.)

93. KH was required to register for the Selective Service System, but did not do so. (Ex. 23.)

94. Chief Fortin did not view KH's involvement with the police as a disqualifier. The reasons were that KH had been open with the fire department investigator about his involvement, and because a substantial period, perhaps 10 years, had elapsed between his involvement and his application to the Marlborough Fire Department in September 2012. (Fortin testimony.)

Discussion

This appeal raises three issues: Was the Marlborough Fire Department reasonably justified in bypassing Mr. Lazazzero because of the 11 incidents it listed under "Background History" and four occasions it listed as possibly "reflect[ing] self control issues" in the bypass letter? Was the Marlborough Fire Department reasonably justified in bypassing Mr. Lazazzero because in his application package, he was "not truthful" in that he "failed to admit that he was under investigation for possession of stolen property in February 2012"? Did the reasonable justifications for bypassing Mr. Lazazzero apply equally to candidates for whom he was bypassed?

Background History and Self Control Issues

The Marlborough Fire Department was reasonably justified in bypassing Mr. Lazazzero for what it called the "Background History" incidents and "self control" issues. *Town Of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004).

"Reasonable justification in this context means done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Police Department of Boston v. Kavaleski*, 463 Mass. 680, 688 (2012)(citations and internal quotation marks omitted).

Chief Fortin was concerned about Mr. Lazazzero's involvement in a road rage incident on January 29, 2005 (Ex. 10) because Mr. Lazazzero exchanged words with another driver and the incident resulted in the police getting involved. He viewed Mr. Lazazzero's assault and battery incident on April 1, 2006 (Ex. 5) as an indication of Mr. Lazazzero's disregard for the law. (Fortin testimony.)

Chief Fortin viewed Mr. Lazazzero's driving with a revoked license on April 6, 2006 (Ex. 14) as an indication of Mr. Lazazzero's disregard for the law. He viewed Mr. Lazazzero's road rage incident on July 22, 2006 (Ex. 13), which involved his having an argument out of doors, as an indication of Mr. Lazazzero's lack of control. (Fortin testimony.)

Chief Fortin was also concerned that Mr. Lazazzero's harassing phone calls on December 31, 2006 (Ex. 12) resulted in the police getting involved. He was concerned about Mr. Lazazzero's disorderly conduct on November 5, 2007 (Ex. 11), because it was mischief that resulted in the police getting involved and putting Mr. Lazazzero in custody. (Fortin testimony.)

Chief Fortin was concerned about Mr. Lazazzero's intoxication on August 30, 2009 (Ex. 9), because it resulted in the police getting involved and because he viewed it as an indication of

Mr. Lazazzero's lack of control. He was concerned about Mr. Lazazzero's surchargeable accidents on September 1 and October 27, 2011 because firefighters must be able to drive fire trucks safely. (Fortin testimony.)

Chief Fortin was concerned about Mr. Lazazzero's purchase of a snowplow that police were investigating in 2012 as possibly having been stolen. (Ex. 8.) He was concerned because firefighters, who have access to millions of dollars' worth of property in businesses and residences, must be trustworthy. (Fortin testimony.)

Chief Fortin is willing to hire candidates who made mistakes when they were young. However, Mr. Lazazzero's purchase of the snowplow was recent, February 2012, during the same year as his application to the Marlborough Fire Department. He was willing to hire candidates who made mistakes and learned from them. However, Chief Fortin viewed Mr. Lazazzero as not having learned from his mischief. In addition, Chief Fortin reasonably viewed the amount of Mr. Lazazzero's involvement with the police as uncommon when compared to other candidates. (Fortin testimony.)

The bypass letter *understated* the seriousness of some incidents, to Mr. Lazazzero's benefit. For example, what the bypass letter referred to simply as "Speeding – Marlborough, Ma. 12/23/05" (Ex. 5) entailed Mr. Lazazzero driving 76 miles per hour in a 40 mile-per-hour zone; driving a vehicle off a road; barely missing a house with his vehicle; having consumed two beers, by his own admission, before driving; being suspected of driving under the influence of alcohol enough that an officer had him perform field sobriety tests; telling the officer untruthfully that no one else had been in the vehicle; acting stupid, by his own admission; and being cited for driving to endanger, speeding, marked lanes violations, and having an open container of alcohol under the front passenger seat.

At the hearing, Mr. Lazazzero admitted the substance of most of the incidents. Although he provided commentary on and explanations for his behavior during the incidents, he did not do so during his application process. For example, he did not provide his commentary and explanations to Mr. Brecken during their one-on-one meeting for approximately one-half hour. (Brecken testimony.)

Question 3

The issue here is not directly how much time and effort Mr. Lazazzero spent trying to answer Question 3 truthfully (Ex. 6), although it does bear on his willfulness in answering untruthfully.

The issue is not whether Mr. Lazazzero's lawyer assured him that he was not under investigation. Although Detective Bonina believes that he conveyed to Mr. Kretowicz that he was investigating Mr. Lazazzero (Bonina testimony), Mr. Kretowicz did not understand the same thing and/or did not convey it to Mr. Lazazzero. (Ex. 7.) "The defense of reliance on advice of counsel is available, but only in limited contexts." *DiLiddo v. Oxford Street Realty, Inc.*, 450 Mass. 66, 80 (2007). If a civil service appeal is one of the limited contexts in which the defense is available, Mr. Lazazzero has not so argued legally.

The issue is not whether Mr. Lazazzero asked two friends who were Marlborough police officers whether he had been under investigation. (Ex. 6, p.3; Lazazzero testimony.) The following is not on the record: the names of the police officers, Mr. Lazazzero's exact questions to them, their exact answers, and the basis of their knowledge. Again, the issue is not directly how much time and effort Mr. Lazazzero spent trying to answer Question 3 truthfully. The issue here is whether Mr. Lazazzero willfully answered Question 3 untruthfully. He did.

Mr. Lazazzero should have answered yes to Question 3 because he had received the incident report before answering Question 3 (stipulation; Ex. 6), and the incident report, and the interview that it memorialized, indicated that Mr. Lazazzero was under investigation. This is so even if the incident report listed him as a victim and did not use the word “suspect” in connection with him.

Mr. Lazazzero knew or should have known that he was being investigated because of two facts. At the beginning of the February 13, 2012 meeting, Detective Bonina told Mr. Lazazzero that he was not under arrest and would not be arrested during the interview. (Ex. 8.) Such an assurance made sense only if Mr. Lazazzero was at risk of arrest – that is, under investigation.

In the incident report, Detective Bonina wrote:

I am also concerned that the upgrades Mr. Lazazzero made were made to permanently change the appearance of the plow after he purchased it.

(Ex. 8.)

In addition to eleven “Background History” incidents and four “self control” incidents as reasonable justifications for bypassing Mr. Lazazzero, the Marlborough Fire Department had his untruthful answer to Question 3 as a reasonable justification.

Mr. Lazazzero’s having been under investigation would not have automatically disqualified him, as a felony conviction would have. And his untruthful answer to Question 3 did not automatically disqualify him (Fortin testimony; *but see* ¶ 64 above and Ex. 2, p. 50), as failing a drug test would have. But his having been under investigation and being untruthful about it were factors in his bypass. (Fortin testimony.)

Chief Fortin told Mr. Lazazzero and other candidates not to surprise him during the application process. (Fortin testimony.) That was a reasonable request from a supervisor who wanted the firefighters reporting to him to keep him apprised of their activities and not surprise

him. Mr. Lazazzero did not comply with this request. In addition to answering Question 3 untruthfully, Mr. Lazazzero's connection to the snowplow investigation surprised and angered Chief Fortin. (Fortin testimony.)

Other candidates

A bypass will not be upheld when "the reasons offered by the appointing authority...apply equally to the higher ranking, bypassed candidate...." *David L. Radochia, Jr., v. City of Somerville*, G1-11-145 at 17 (Nov. 29, 2012)(citation and internal quotation marks omitted).

I do not have the details of any investigation into Candidate JA's failure to attend a recertification course. It appears that his answer to Question 3 on his Employment Application Package was untruthful. However, his list of involvement with the police and incidents demonstrating disregard for the law was much shorter than Mr. Lazazzero's list. It cannot be said that the reasonable justifications to bypass Mr. Lazazzero applied equally to JA. The two candidates were not equal and did not approach being equal in terms of the drawbacks to their candidacies.

KH's records of involvement with the police in California are difficult to decipher from the documents in Exhibit 23. Nonetheless, his list of involvement with the police was much shorter than Mr. Lazazzero's list. He apparently answered Question 3 truthfully. His apparent failure to register for the Selective Service System shows disregard for the law. However, it cannot be said that the reasonable justifications to bypass Mr. Lazazzero applied equally to KH. The two candidates were not equal and did not approach being equal in terms of the drawbacks to their candidacies.

JC's list of involvement with police was longer than JA's and KH's lists, but not as long as Mr. Lazazzero's list. Although the Marlborough Fire Department could have viewed JC's

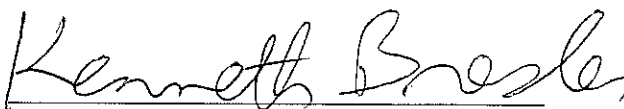
ATV incident with particular concern, the department viewed it as having taken place long enough before his application, four years, to mitigate the concern. JC and Mr. Lazazzero were not equal and did not approach being equal in terms of the drawbacks to their candidacies.

The Marlborough Fire Department proved by a preponderance of the evidence that it was reasonably justified in bypassing Mr. Lazazzero. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241(2006). Although some of the candidates for whom the Marlborough Fire Department bypassed Mr. Lazazzero did have relatives working there, the appointing authority has demonstrated that it bypassed Mr. Lazazzero because of his eleven "Background History" incidents, four "self control" incidents, and untruthful answer to Question 3, not to favor the candidates with relatives in the department.

Conclusion and Order

The Appointing Authority had reasonable justification to bypass the appellant. The reasons do not apply equally to the candidates for whom he was bypassed. I recommend that his appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script that reads "Kenneth Bresler". The signature is written in dark ink and is positioned above a horizontal line.

Kenneth Bresler
Administrative Magistrate

Dated: NOV - 5 2013