

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

HENRY LIMA,
Appellant

v.

G1-16-135

CITY OF SOMERVILLE,
Respondent

Appearance for Appellant:

Pro Se
Henry Lima

Appearance for Respondent:

Shannon T. Phillips, Esq.
Assistant City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Commissioner:

Christopher C. Bowman

DECISION

On August 5, 2016, the Appellant, Henry Lima (Mr. Lima), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Somerville (City) to bypass him for original appointment for the position of permanent reserve firefighter in the City's Fire Department. A pre-hearing conference was held on August 30, 2016 at the offices of the Commission. A full hearing was held at the same location on November 2, 2016.¹ The full hearing was digitally recorded.² Both parties submitted post-hearing briefs on January 6, 2017.

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.

FINDINGS OF FACT:

The City submitted thirty-six (36) exhibits at the hearing and, per my request, submitted six (6) additional documents after the hearing which I marked as Exhibits 37-42. Mr. Lima submitted five (5) exhibits at the hearing, many of which contain multiple documents, which I marked as Exhibits A – E. Based on these exhibits, the stipulated facts, the testimony of:

Called by the City:

- Sean Sylvester, Police Officer; City of Somerville;
- William Roche, Assistant Personnel Director, City of Somerville;
- Patrick Sullivan, Fire Chief, City of Somerville;

Called by Mr. Lima:

- Henry Lima, 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:

Mr. Lima

1. Mr. Lima is forty-one (41) years old. He has lived in Somerville most of his life. (Testimony of Mr. Lima)
2. Between 1992 and 1995, Mr. Lima attended high school. He stopped attending high school when he was a sophomore or junior to work full-time and care for his bed-ridden grandmother and an uncle who was suffering from mental illness. (Testimony of Mr. Lima)
3. In 1998, Mr. Lima obtained his high school equivalency diploma. (Testimony of Mr. Lima)

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.

4. From 1999 to 2004 and from 2008 to October 2016, Mr. Lima was employed as a Correction Officer at the Middlesex County Sheriff's Office (Sheriff's Office). (Testimony of Mr. Lima)
5. From 2004 to 2008, Mr. Lima was employed by the Four Seasons Hotel and then at a company named International Data. (Testimony of Mr. Lima)
6. While Mr. Lima was employed at the Sheriff's Office between 2004 and 2008, he had no disciplinary record. (Testimony of Mr. Lima)
7. Between August 2010 and March 2013, Mr. Lima, while employed at the Sheriff's Office, received three (3) verbal warnings and one (1) written warning for sick leave abuse and/or tardiness. (Exhibit 9)
8. In 2010, Mr. Lima began suffering from various medical ailments, including acid reflux, skin irritations, constant headaches, the taste of lead in his mouth, stomach issues and asthma. Mr. Lima attributes these ailments to his exposure to toxic chemicals (i.e. – ammonia) at the Sheriff's Office. (Testimony of Mr. Lima)
9. On September 22, 2016, the state's Department of Industrial Accidents ordered the Sheriff's Office to pay Mr. Lima \$485.28 / week in workers compensation benefits retroactive to June 14, 2015. At the time of the hearing, Mr. Lima was still collecting workers compensation benefits based on his claim against the Sheriff's Office. (Exhibit A & Testimony of Mr. Lima)
10. On October 25, 2016, Dr. Christine Oliver, a physician at Massachusetts General Hospital, penned a letter, which stated in part: "In my opinion, Mr. Lima's workplace exposure during the time period 2010 approximately to the summer of 2015 adversely and severely affected all aspects of his health. As a consequence, his time and attendance suffered." (Exhibit A)

Appointment Process

11. William Roche is the City's Assistant Personnel Director. At the time of this appointment, he was the City's Personnel Director, a position he served in for four (4) years. In that capacity, he oversaw the appointment process regarding reserve firefighter candidates, including the appointment processes that are the subject of this appeal. (Testimony of Mr. Roche)
12. In 2014, Mr. Roche's nephew (Candidate A) took and passed the civil service examination for firefighter. As a result, his name appeared on an eligible list of firefighter candidates established by the state's Human Resources Division (HRD) on November 1, 2014. (Testimony of Mr. Roche and Stipulated Facts)
13. Mr. Roche is not the only City employee who is related to Candidate A. Candidate A's father, brother, 2 cousins and another uncle are also employed by the City. (Exhibit 33)
14. Mr. Lima took and passed the same civil service examination and also had his name placed on the November 1, 2014 eligible list. His name appeared above that of Candidate A. (Stipulated Facts)
15. On July 7, 2015, at the request of the City, HRD generated Certification No. 03043 from which the City could appoint ten (10) reserve firefighter candidates. This Certification contained the names of forty-five (45) candidates, ranked from 1 to 10, with many ties among various rankings (i.e. – Mr. Lima was tied with nine (9) other candidates for the tenth ranking.). Thirty-one (31) candidates, including Mr. Lima, signed Certification No. (Exhibit 5)
16. At or around the time that Mr. Lima's name appeared on Certification No. 03043, Mr. Roche's daughter told Mr. Roche that Mr. Lima had contacted her via her Facebook account

and asked her to put in a good word for him. Apparently, they were acquaintances.

(Testimony of Mr. Roche)

17. Candidate A's name did not appear on the July 7, 2015 Certification. (Exhibit 5)

18. Patrick Sullivan is the City's Provisional Fire Chief. He began working for the City's Fire Department thirty-one (31) years ago, working his way up the ranks. He took and passed the promotional examination for Fire Chief in 2015. Since his name was the only one that appeared on the eligible list for Fire Chief in Somerville, the City's Mayor (who is the Appointing Authority here), had the option of making a "provisional" promotion to Fire Chief, choosing from anyone in the next lower title, until such time as a new eligible list (with at least three names) is established. In the alternative, the City's Mayor could have appointed Mr. Sullivan as the City's permanent Fire Chief. In May 2015, the Mayor chose to promote Mr. Sullivan to Fire Chief on a provisional basis. (Testimony of Chief Sullivan)

19. Sometime between July 7th and July 10th, 2015, Chief Sullivan was asked either by the Mayor or the Personnel Director if he could use five (5) additional reserve firefighters.

(Testimony of Chief Sullivan)

20. On July 10, 2015, at the City's request, HRD sent the City seven additional names (all tied for 11th) for Certification No. 03043 and increased the number of appointments that could be made from 10 to 15. (Testimony of Mr. Roche & Exhibit 5)

21. Candidate A was among the seven (7) additional names forwarded to the City on July 10th. Six (6) of the seven (7) candidates, including Candidate A, signed the Certification as willing to accept appointment. (Exhibit 5)

22. As part of the appointment process, all candidates undergo a background investigation that is completed by a member of the City's police department. Mr. Lima's background

investigation was completed by Somerville Police Officer Sean Sylvester, a 15-year police officer who has completed several other background investigations on other candidates in the past. (Testimony of Mr. Roche & Officer Sylvester)

23. As part of the background investigation of Mr. Lima, Officer Sylvester contacted the Security Director at the Four Seasons hotel, where Mr. Lima was previously employed. The Security Director told Officer Sylvester that Mr. Lima was a good employee; that she found him to be reliable; and, in her opinion, would be an excellent addition to the City's Fire Department. (Exhibit 6)
24. Also as part of his background investigation, Officer Sylvester spoke with a sergeant at the Sheriff's Office. The sergeant informed Officer Sylvester that Mr. Lima was a good employee "when he showed up for work" and that there were "issues" with Mr. Lima's tardiness and attendance. (Exhibit 6)
25. Officer Sylvester also reviewed Mr. Lima's personnel record from the Sheriff's office which confirmed that he had received three (3) verbal warnings and one (1) written warning between 2010 and 2013 for absenteeism and/or tardiness. (Testimony of Officer Sylvester and Exhibit 9)
26. Officer Sylvester also reviewed Mr. Lima's high school transcripts which showed a high level of absenteeism and tardiness while Mr. Lima was in high school. (Testimony of Officer Sylvester and Exhibit 10)
27. Officer Sylvester also reviewed Mr. Lima's credit history which showed that he was "behind on everything" and that some accounts were in collection. (Testimony of Officer Sylvester and Exhibit 11)

28. On November 3, 2015, Officer Sylvester met with Mr. Lima to discuss his findings from the background investigation. At that time, Mr. Lima explained that he had been out of work due to an illness related to exposure to chemicals in the workplace which caused him to get behind on his bills. Mr. Lima also told Officer Sylvester that the record of tardiness and absenteeism were also attributable to his ailments. (Testimony of Officer Sylvester and Exhibit 6)
29. Officer Sylvester told Mr. Lima that he may want to withdraw his application, get things cleaned up (i.e. – credit issues); and reapply in a subsequent hiring cycle. Mr. Lima declined to withdraw from the hiring process and Mr. Lima submitted a summary of his findings to his supervisor, Lt. Timothy Mitsakis. (Testimony of Officer Sylvester & Exhibit 6)
30. Sometime in October or November 2015, Mr. Lima’s background investigation was forwarded to Mr. Roche. (Exhibit 6)
31. On October 30, 2015, Lt. Mitsakis forwarded the background investigation of Candidate A to Mr. Roche. The correspondence is addressed “To: Personnel Director William Roche” and “From: Lt. Tim Mitsakis”. Lt. Mitsakis included a section with the title “Personal Note” on Candidate A’s background summary that is not included in Mr. Lima’s background investigation. In this added section, Lt. Mitsakis wrote: “[Candidate A] is the ideal candidate for any position. He is polite, easy going and has the perfect personality from a management perspective.” (Exhibit 32)
32. Candidate A graduated from high school in 2013 and his employment history, at the time of the background investigation, consisted of part-time seasonal employment with the City, being a bar back at a local tavern and since, May 2015 working at Macy’s. There is no

reference to his attendance record in high school nor is his high school transcript included as part of the background investigation submitted to the Commission by the City. (Exhibit 33)

33. On November 10, 2015, Mr. Roche completed a “Disclosure of Appearance of Conflict Interest as Required by G.L. c. 268A, § 23(b)(3)” form in which he wrote the following:

“My nephew [Candidate A] is an applicant for firefighter in the City of Somerville. The City of Somerville requested enough names from the Human Resources Division to put 15 candidates on the reserve list. He is approximately 45th in the list, tied with six other individuals.

As Personnel Director, I oversee the process for the selection of firefighters to recommend to the Mayor. More specifically, I review applications, background checks, CORI checks, driver’s license records, and participate in the interview process. The interviewing panel, which consists of three members, makes a recommendation to the Mayor.

My nephew is on the civil service list provided by Human Resources Division.

....

Although I participate in the interview process, I will not be participating in his interview, if it becomes necessary. If selected by the interview team, I will forward his name with other selected individuals for approval to the Mayor. The Mayor is the appointing authority. The Board of Aldermen confirms all candidates. The original list was provided by HRD and I have no role in that list. Anyone bypassed has appeal right to HRD.

Taking into account the facts that I have disclosed above, I feel that I can perform my official duties objectively and fairly.” (Exhibit 37)

34. Sometime prior to January 25, 2016, Mr. Lima, who had not been issued a conditional offer of employment, was required by the City to undergo a medical and psychological evaluation. After taking the first level psychological evaluation, he was informed that he would need to proceed to a second-level psychological interview, which was canceled due to weather.³

(Testimony of Mr. Lima)

³ The City has acknowledged that medical examinations should not be conducted unless and until a conditional offer of employment has been made to a candidate and has changed its practices in this regard on a going-forward basis. (See Exhibit 1)

35. On January 25, 2016, Mr. Lima, who was ranked above Candidate A, was interviewed by a three-member interview panel consisting of Mr. Roche; Robert Collins, who was the City's labor counsel at the time; and the Fire Chief. (Testimony of Mr. Lima and Mr. Roche)
36. Mr. Lima, and all other candidates, were asked the same twenty-five (25) questions by the interview panel and all of the panelists took and retained their hand-written notes from the interviews. (Testimony of Mr. Roche and Chief Sullivan & Exhibit 12)
37. During this interview, Mr. Lima was given an opportunity to address the issues raised in the background investigation, including the verbal and written warnings that he had received from the Sheriff's Office regarding tardiness and absenteeism. In response, Mr. Lima told the panelists that he had been exposed to toxic chemicals in the workplace and that he and others were currently out of work collecting workers compensation. (Testimony of Mr. Roche)
38. Mr. Roche has a familiarity with workplace safety and workers compensation issues. Based on this background, it is Mr. Roche's understanding that Mr. Lima, based on his answer, should be in possession of a "Material Safety Data Sheet (MSDS)" issued by the Sheriff's Office. Seeking to "validate" Mr. Lima's answer, Mr. Roche asked him to produce the MSDS. (Testimony of Mr. Roche)
39. Mr. Roche took further steps to "validate" Mr. Lima's answer, including Mr. Lima's assertion that other employees were out of work due to the exposure of toxic chemicals in the workplace at the Sheriff's Office. On January 27, 2016, Mr. Roche sent an email to the City's Police Chief stating:

"Chief, a background investigation was completed for FF candidate Henry Lima. It was a thorough well done investigation. Unfortunately no one signed the report so I am not sure who did it. However after interviewing the candidate we have a few more questions that need to be answered and was hoping for a follow-

up investigation.

The candidate is currently out of work for what he claims is a work related incident (exposure to chemicals). However unemployment was denied and the candidate currently has an attorney claiming the employer refuses to offer him reasonable accommodations to return to work. He has submitted a request for MSDS sheets which he says they refuse to supply. He also claims he is not the only employee affected by this issue.

Could the investigator return to employer and attempt to have the following questions answered?

Questions that we would like answered....

1. Why did the employer contest and why was unemployment denied if this is a work related accident?
2. Was the request for MSDS sheets denied? If so, why?
3. Why was the request for reasonable accommodation denied?
4. How many others were affected and out of work for exposure to these chemicals?
5. Will Henry be offered his job back when all issues resolved?

Please have the investigator call me prior to contacting employer” (Exhibit 38)

40. In response to Mr. Roche’s request, Officer Sylvester contacted the Assistant Human Resources Director at the Sheriff’s Office. On January 28, 2016, Officer Sylvester replied to Mr. Roche’s email with the following answers:

1. “Due to the fact that the diagnosis was made by Mr. Lima’s physician with no air quality studies or even a visit to the facility by him, they denied the claim until a more extensive review can more definitely determine the cause of the illness.
2. The MSDS form was requested by Mr. Lima’s attorney. According to [the Assistant Human Resources Director] it has not been denied, but also has not been provided as of today, but anticipates they will be supplying it in the near future.
3. [The Assistant Human Resources Director] stated that a request was made, but due to the fact that Mr. Lima’s illness is undetermined, they wouldn’t provide reasonable accommodations until the outcome of the diagnosis was definitive.
4. [The Assistant Human Resources Director] stated that one other employee was out of work due to allergies. However he stated that employee was not claiming that it was due to the cleaning chemicals. He went on to say that they were unrelated in nature and knew of no other similar claim.
5. [The Assistant Human Resources Director] stated that Mr. Lima, although not currently working, is still gainfully employed by the MSO.” (Exhibit 38)

41. As part of the January 25, 2016 interview, Mr. Lima (and all other candidates) were asked the following question by the Fire Chief: “7. You will be given orders to do something that may put your life in jeopardy. How do you handle order you do not agree with especially if you think your life is in jeopardy? (Testimony of Mr. Roche and Chief Sullivan & Exhibit 12)
42. Chief Sullivan was looking for candidates to respond to this question by either saying: a) they would comply with the order unconditionally; and/or b) they would comply with the order assuming that it was a lawful and ethical order. (Testimony of Chief Sullivan)
43. In his answer to the interview panel regarding this question, Mr. Lima stated that he would talk amongst the crew about the order and that he may go outside the chain of command. Chief Sullivan considered this answer completely unacceptable given the need for firefighters to abide by the orders of commanders at the scene of a fire. (Testimony of Chief Sullivan)
44. Candidate A, who is Mr. Roche’s nephew, was interviewed by Chief Sullivan and the City’s labor counsel. Mr. Roche did not participate in the interview of his nephew. (Testimony of Chief Sullivan)⁴
45. At the conclusion of all of the interviews, the three (3) members of the interview panel met and discussed all of the candidates that had been interviewed. When it came time to discuss Candidate A, Mr. Roche “stepped back” and did not participate in the discussion. (Testimony of Chief Sullivan)
46. The panelists prepared a list of fifteen (15) reserve firefighter candidates to be submitted to the Mayor. (Testimony of Chief Sullivan)⁵

⁴ During his testimony before the Commission, Mr. Roche stated that he believed that his Deputy Director served as a third interview panelist regarding his nephew. Chief Sullivan stated that only he and labor counsel conducted the interview, which appears to be the case.

47. Sometime after the interview panel developed a list of fifteen (15) reserve firefighter candidates to be submitted to the Mayor, Mr. Roche met with the Mayor regarding the recommended candidates. (Testimony of Mr. Roche)
48. During this meeting, the Mayor asked Mr. Roche whether there were “other good candidates” further down the Certification and Mr. Roche stated that they were “all good candidates.” Mr. Roche acknowledges that one of the other “good candidates” was his nephew, Candidate A. The end result of this meeting was that the City would proceed with appointing twenty-five (25), as opposed to fifteen (15), reserve firefighters. (Testimony of Mr. Roche)
49. Chief Sullivan has a vague recollection of being asked by the Mayor at some point if he could use twenty-five (25) instead of fifteen (15) firefighters. Chief Sullivan, referencing a recent consultant’s study prepared by “the Carlson Group”, told the Mayor that he could indeed use twenty-five (25) reserve firefighters. (Testimony of Chief Sullivan)
50. Proceeding on the assumption that the City could appoint twenty-five (25) candidates, the City prepared a series of bypass letters, including the one sent to Mr. Lima on February 19,

⁵ Mr. Roche and Chief Sullivan provided conflicting testimony regarding how many candidates were on the list of recommended candidates prepared by the interview panel. Chief Sullivan testified that the interview panel prepared a list of fifteen (15) candidates to recommend to the Mayor while Mr. Roche testified that the panel prepared a list of twenty-five (25) recommended candidates. Given that Mr. Roche’s nephew (Candidate A) was tied for last on the Certification, and, realistically, would not have been reached if the list was limited to 15, this is an important distinction. Since both Mr. Roche and Chief Sullivan testified that there was some type of hand-written list of the 15 (or 25) candidates recommended by the interview panel, I left the record open for the City to provide those documents. The City did not submit this information and, instead, indicated that, after a thorough review, no such document exists. I credit the testimony of Chief Sullivan and find that the interview panel recommended 15 and not 25 candidates. His testimony appeared more candid – and logical. Further, it is actually consistent with Mr. Roche’s own testimony (see subsequent findings), at or around the 01:23:30 marker of the recorded hearing, where Mr. Roche references a meeting he had with the Mayor after the initial interviews had been conducted. Mr. Roche testified that the Mayor inquired about other “good candidates” further down the list and whether they could be appointed as well. According to Mr. Roche’s testimony, it was at this point, that it was decided to go forward with appointing twenty-five (25) candidates, which is entirely consistent with Chief Sullivan’s testimony that the interview panel, consistent with the revised Certification issued on July 10th, recommended 15 candidates.

2016. On Page 2 of that bypass letter, signed by the Mayor, it states that one of the candidates being appointed was Candidate A, who was ranked below Mr. Lima. (Exhibit 4)
51. The February 2, 2016 bypass letter provided negative reasons associated with Mr. Lima as well as positive reasons associated with candidates ranked below him on Certification No. 03043. The negative reasons associated with Mr. Lima were: his “history of time and attendance issues, a poor credit history as well as a poor performance during [the] interview with the Panel including willingness to operate outside the chain of command and disobey orders that you do not agree with.” (Exhibit 4)
52. The positive reasons listed for Candidate A were that he: “has no criminal history, no motor vehicle infractions, excellent credit history, a strong work history and a demonstrated commitment to the community. His record demonstrated initiative and his responses to the Panel’s questions were thoughtful, mature and complete.” (Exhibit 4)
53. Sometime after February 2, 2016, the City was informed by HRD that an insufficient number of candidates had signed Certification No. 03043 for the City to appoint twenty-five (25) candidates. (Testimony of Mr. Roche)
54. In light of this information from HRD, the City, on March 24, 2016, moved forward with appointing only fifteen (15) candidates from Certification No. 03043. Candidate A was not among the candidates appointed. (Exhibit 40)
55. One (1) day earlier, on March 23, 2016, the City informed Mr. Lima that, based on the appointment of only fifteen (15) candidates, his name was not reached for appointment. Thus, the non-selection of Mr. Lima no longer constituted a bypass that could be appealed to the Commission. (Exhibit 5)

56. On April 19, 2016, at the request of the City, HRD sent Certification No. 03715 to the City, from which it could appoint fifteen (15) additional reserve firefighter candidates (in addition to the fifteen (15) candidates that had recently appointed from Certification No. 03043, potentially increasing the number of reserve firefighters to be appointed to 30. (Stipulated Fact and Exhibit 2 and Testimony of Mr. Roche)
57. Chief Sullivan “didn’t realize” at the time that the City was now seeking to appoint a cumulative total of 30, as opposed to 25, candidates. (Testimony of Chief Sullivan)
58. Mr. Lima signed Certification No. 03715 as willing to accept appointment as did Candidate A. Consistent with the prior Certification, which was drawn from the same eligible list, Mr. Lima’s name appeared above that of Candidate A. (Exhibit 2)
59. In regard to the candidates on Certification No. 03715, the City decided that it would not conduct any further interviews for those candidates who had already been interviewed in the prior hiring cycle and that the City would simply update the background investigations for the intervening period. (Testimony of Mr. Roche)
60. For those candidates on Certification No. 03715 who had not participated in the prior hiring cycle, they underwent a full background investigation and interview. (Testimony of Mr. Roche)
61. Having previously received a bypass letter, which was subsequently rescinded, stating that he had been bypassed in part because of his answer to a question to the interview panel regarding chain of command and his attendance record at the Sheriff’s Office, Mr. Lima asked for a new interview as part of this new hiring cycle. (Testimony of Mr. Lima)
62. A new interview was held at which time Mr. Lima reiterated to the interview panel that his absences at the Sheriff’s Office were related to his exposure to chemicals. In response, one

of the panelists told Mr. Lima that his explanation didn't match up with the information provided by the Sheriff's Office. (Testimony of Mr. Lima)

63. Also during the new interview, Mr. Lima told the interview panel that there must have been some confusion regarding the chain of command question. Mr. Lima assured the panelists that he respects the chain of command and, that, in his seventeen (17) years in the public safety field, he has never disobeyed an order. (Testimony of Mr. Lima)

64. At some point, Mr. Lima was asked by a member of the interview panel to step outside the room so the interview panel could discuss the matter privately. After several minutes, Mr. Lima was called back into the room. A member of the interview panel told Mr. Lima that the question regarding chain of command was clearly stated during the first interview.

(Testimony of Mr. Lima) Despite Mr. Lima's clarification at the second interview, Chief Sullivan was still concerned about Mr. Lima's initial answer in which he referenced going outside the chain of command when given an order that could put his life in jeopardy.

(Testimony of Chief Sullivan)

65. A member of the interview panel suggested that Mr. Lima may want to withdraw his application, which he declined to do. (Testimony of Mr. Lima)

66. In regard to the updated background investigation of Mr. Lima, Lt. Mitsakis sent a memo to Mr. Roche dated May 27, 2016 stating: "On May 26, 2016, Officer Sylvester spoke with the Middlesex Sheriff's Department Human Resources Division. He was informed that Mr. Lima was still employed but remains out on the family medical leave act (FMLA)." (Exhibit 42)

67. In regard to the updated background investigation of Candidate A, Lt. Mitsakis sent a memo to Mr. Roche dated May 25, 2016 stating: "Stop (sic) working at Macy's since last

background check. No other changes to report since background was completed in October 2015.” (Exhibit 42)

68. In a letter dated June 9, 2016, the City’s Mayor sent Mr. Lima a non-selection letter stating the reasons for bypass. In regard to the negative reasons, the Mayor’s letter states:

“The reasons associated with your non-selection as a Somerville Firefighter are based on your history of time and attendance issues, a poor credit history as well as a poor performance during your interview with the Panel including willingness to operate outside the chain of command, and disobey orders that you do not agree with.

On May 25, 2016, you appeared once again before the interview panel at your request. You stated that you wanted to explain yourself further and asked that the panel repeat questions previously provided. Specifically a series of questions related to following orders. The panel offered you the opportunity to convince them of your suitability however declined to repeat the previous questions. Your second appearance before the panel failed to dispel the grave concerns that the panel had concerning your candidacy.” (Exhibit 3)

69. The June 9, 2016 letter contained the same positive reasons associated with the candidates who bypassed Mr. Lima, including Candidate A’s “strong work history”. (Exhibit 3)

70. Among the other candidates who bypassed Mr. Lima was Candidate B, whose father is employed by the City of Somerville. The positive reasons listed for Candidate B were:

“[Candidate B] has good credit and a positive work history. He was forthcoming and honest in his responses to the Panel’s questions including questions to an arrest five and one half years prior where the case was ultimately dismissed. The candidate spoke of, and his record reflected, a clean mature record since the occurrence.” (Exhibit 3)

71. The background investigation of Candidate B states in part:

“[Candidate B] had a suspension placed on his license for a citation in 2010, and he did not list this on his application. I spoke with [Candidate B] about it, and he claimed he did not know anything about the suspension, and he did not list the citation he received because it was more than 5 years old. The citation had been paid in 2011, and his license was reinstated and is currently active.” (Exhibit 13)

72. Also among the other candidates who bypassed Mr. Lima was Candidate C, whose step-father is a District Fire Chief; his mother is a retired Fire Department employee; and whose

father and brother are also employed by the City. The positive reasons listed for Candidate C were:

“[Candidate C] was prepared, mature, had no outstanding credit issues, no criminal history and a positive performance before the interview panel responding clearly and concisely to the questions posed to him.” (Exhibit 3)

73. The background investigation of Candidate C states in part:

“I spoke to [former employer] and it seems him and [Candidate C] didn’t have a great work history. [Candidate C] was let go ... after three years. [Former Employer] stated that [Candidate C] was lazy and unreliable.” (Exhibit 22)

74. Lt. Mitsakis added a “Personal Note” section to this particular background investigation stating:

“[Candidate C] is self employed so its tough to see how his work ethic is compared to what his past employer had to say. Hopefully with the right motivation [Candidate C] can be directed into the same successful career as a firefighter that his brother currently is and his mother was when she worked for the fire department.” (Exhibit 22)

75. On September 13, 2016, the City’s Mayor signed a “Notice of Employment” listing the names of twenty-four (24) additional candidates to be appointed as reserve firefighters.

Candidate A was the last name listed on the Notice of Employment as he was in the last tie group from Certification No. 03715. (Exhibit 41)

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, 256 (2001), citing Cambridge v. Civil Serv. Comm’n., 43 Mass.App.Ct., 300 (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, § 1.

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.

Analysis

Once again, the Commission is faced with an appointment process that was potentially compromised because of the involvement of an individual whose relative was among the candidates under consideration.

Unfortunately, this is not new ground for the Commission.

In Investigation Re: 2010 / 2011 Review and Selection of Firefighters in the City of Springfield, I-11-208 (2011), the Commission found that the involvement of a Deputy Fire Chief whose son was a candidate for appointment tainted the appointment process. The Commission let the appointment stand but ordered that candidates bypassed for appointment be reconsidered in a subsequent hiring cycle where interviews would be conducted by an outside review panel.

In Investigation Re: 2011 Review and Selection of Intermittent Police Officers in the Town of Oxford, I-11-280 (2011), the Commission found that the involvement of a Selectman whose niece was a candidate for appointment tainted the appointment process. The Commission halted the then-ongoing appointment process, prohibited two (2) selectmen from participating in the hiring process and ordered the use of an outside review panel to evaluate the candidates.

In Investigation Re: 2009 Review and Selection of Reserve Police Officer in the City of Methuen, I-09-290 (2009), the Commission found that the Police Chief’s involvement in a hiring process in which her niece was a candidate tainted the appointment process. The Commission

effectively rescinded the appointment of the Police Chief's niece and ordered a new review process.

In Minoie v. Town of Braintree, 27 MCSR 216 (2014) & 27 MCSR 615 (2014), the Commission found that the Police Chief's involvement in a hiring process in which his son was a candidate tainted the appointment process. The Commission let the appointment stand but initiated an investigation in which the Town was ordered to revamp its hiring practicing to prevent such occurrences in the future.

The arguments raised by the Appointing Authorities in Springfield, Methuen and Minoie were strikingly similar to that being argued here by Somerville: as long as the employee does not participate in the interview of his relative, the hiring process has not been compromised. That is simply not the case.

Mr. Roche, who was then serving as the City's Personnel Director, and whose nephew was a candidate for reserve firefighter, actively participated in various decisions regarding the appointment process that could be viewed as beneficial to his nephew.

First, as noted in the findings, the initial July 7, 2015 Certification, which authorized the City to appoint ten (10) reserve firefighters, did not contain the name of Mr. Roche's nephew. Mr. Roche was involved in the decision-making process which resulted in the City, three days later, expanding the vacancies to be filled to 15 and requesting more names from HRD, which included the name of his nephew.

Second, after the name of Mr. Roche's nephew was not among those recommended to fill the 15 reserve firefighter slots, Mr. Roche and the Mayor had a discussion about going further down the Certification and appointing other "good candidates" which Mr. Roche acknowledges included his nephew.

Third, after being told by HRD that the City would not be in compliance with the statutory “2N+1” formula if it appointed twenty-five individuals, Mr. Roche was involved in the decision-making process to appoint 15 and then request another Certification weeks later. That new Certification actually requested sufficient names to appoint another 15 reserve firefighters, bringing the reserve list to 30, something even Fire Chief Sullivan was unaware of.

Fourth, Mr. Roche actively participated in the decision to bypass other candidates, including Mr. Lima, who were ranked above his nephew. Given that Mr. Roche’s nephew was ranked in the last tie group on the Certification, any decision to bypass candidates ranked above his nephew had the potential to benefit his nephew, especially given the limited number of appointments that could be made under the “2N+1” formula.

While I respect Mr. Roche’s sincere belief that his decision to recommend bypassing Mr. Lima was unrelated to his nephew’s candidacy, the stark contrast in how these two (2) candidates were reviewed creates, at minimum, the perception that there was not a level playing field.

For example, when Mr. Lima told the interview panel that his absences at the Sheriff’s office were related to workplace conditions for which he had filed a workers compensation claim, Mr. Roche personally asked the City’s Police Department to effectively re-open Mr. Lima’s background investigation and pose a series of specific questions to the Sheriff’s office about Mr. Lima’s workers compensation claim. In contrast, when, as part of a follow-up background investigation, it was determined that Mr. Roche’s nephew was no longer employed at Macy’s, there was no request to follow-up with Macy’s regarding why this relatively short employment had come to an end. In fact, the City actually cited Candidate A’s “strong work history” as a reason for selecting him over Mr. Lima. The record shows an understandably limited work history for Candidate A, who had only graduated from high school a few years earlier. Mr.

Roche should not have played any role in reviewing the background investigation of his nephew – or any other candidates, including those ranked above his nephew who were competing for the same position.

For the same reasons, Mr. Roche should also not have been involved in interviewing and ranking other candidates who were in direct competition for the same position being sought by his nephew.

More globally, I was troubled by what seemed to be an inclination to view the results of background investigations through a different lens, depending on whether the candidate was known to the City because of his relation to incumbent employees. For example, when Mr. Lima’s current longtime employer stated that he was a good employee “when he showed up”, the investigator drew a negative inference and asked for more detailed information. In contrast, when a recent former employer labeled a candidate ranked below Mr. Lima as “lazy and unreliable” the police lieutenant conducting the background investigation opted to write a “personal note” referencing the work ethic of the candidate’s family members who were employed by the City. Put simply, this is the type of disparate treatment of candidates that the civil service system is meant to prevent.

Against this backdrop, the City argues that it had reasonable justification to bypass Mr. Lima based on what they ultimately called their “grave concerns” about his time and attendance issues, a poor credit history and his answer to a question at the interview stating that he would go outside the chain of command. The lack of a level playing field here makes it difficult, at best, to determine whether the City would have viewed Mr. Lima’s background and answers in a different lens if he, like other lower-ranked candidates, had strong familial connections to City employees. For example, would the interview panel have given more weight to the fact that Mr.

Lima had filed a claim for workers compensation before drawing negative conclusions about his time and attendance if his father was a District Fire Chief for the City? Would they have given more weight to the fact that he was, at least for some period of time, out of work, when evaluating his credit history if his father was a building inspector for the City? Finally, would they have accepted what, at least to me, appeared to be his sincere statement that he has never disobeyed an order during his long career in public safety before concluding that they had “grave concerns” about his ability to follow the chain of command if his brother was a firefighter for the City?⁶

Mr. Lima deserves to be evaluated as part of a process that, at a minimum, has not been compromised by a perception that a different standard was applied to candidates whose relatives were longtime employees of the City. In reaching this conclusion, I have not overlooked that Mr. Lima himself sought to gain an advantage in the hiring process by reaching out to Mr. Roche’s daughter on Facebook. While that outreach was wrong, it doesn’t change my opinion that the overall process here was compromised and a reconsideration of Mr. Lima’s employment application is warranted.

For these reasons, Mr. Lima’s appeal under Docket No. G1-16-135 is hereby *allowed*. Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

⁶ I have not overlooked that Mr. Lima’s application indicates that this cousin is a baseball coach at Somerville High School. To me, this wasn’t comparable (at all) to the strong, well-known familial connections of the candidates ranked below him who were appointed.

- 1) The state's Human Resources Division shall place the name of Henry Lima at the top of the next Certification for the position of permanent reserve firefighter in the City of Somerville until he has been appointed or bypassed.
- 2) When Mr. Lima's name appears on the next Certification, the City of Somerville shall ensure that a de novo review of his candidacy is conducted with no negative inferences drawn from the appointment process which was the subject of this appeal.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso – Not Participating]) on March 2, 2017.

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:
Henry Lima (Appellant)
Shannon Phillips, Esq. (for Respondent)
Patrick Butler, Esq. (HRD)