COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

CORY MATCHEM
Appellant

CASE NO. G1-19-234

v.

CITY OF BROCKTON,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Corey Matchem, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), from his bypass by the City of Brockton (Brockton) for appointment to the position of permanent, full-time firefighter in the Brockton Fire Department (BFD).[1] A pre-hearing was held at UMass School of Law in Dartmouth on December 13, 2019 and a full hearing was via remote videoconference (Webex) on August 19, 2020, which was audio/video recorded.[2] Nineteen Exhibits (*Exhs 1-13,15-19, PHExh.20)* were received in evidence. Proposed Decisions

[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.

[2] Copies of the recording the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the 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.

were received from the Appellant on October 30, 2020 and from Brockton on November 13, 2020. For the reasons stated, Mr. Matchem's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Michael F. Williams, BFD Fire Chief

Called by the Appellant:

- Appellant did not testify and called no witnesses

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Cory Matchem, took and passed the written portion of the civil service examination for Firefighter on March 24, 2018 and took and passed the Entry Level Physical Abilities Test (ELPAT) portion of the examination on July 11, 2018. His name was placed on the Firefighter eligible list established by the Massachusetts Human Resources Division (HRD) on October 1, 2018. (*Exh.1; HRD Prehearing Submission 11/22/19*)

2. On August 13, 2019, HRD issued Certification 06541 authorizing Brockton to appoint ten (10) Firefighters for the BFD. Mr. Matchem's name appeared on the Certification in 15th place in a tie group with four other candidates. (*Exh.1; HRD Prehearing Submission 11/22/19*)

3. Mr. Matchem signed the Certification as willing to accept appointment and completed the required application package. A background investigation was completed and he was interviewed on or about February 22, 2019 by a panel consisting of BFD Fire Chief Williams, Deputy Chief Marchetti, Captain Michael McKenna and Firefighter Victor Soto-Perez. (*Exhs. 1 & 4 through 7; Testimony of Williams*)

4. By letter dated October 30, 2019, Brockton Mayor Rodrigues informed Mr. Matchem that he found him an unsuitable candidate who was "ineligible for employment by the Brockton Fire

Department due to your non-compliance with the department's Tattoo, Body Piercing and Mutilation Policy for New Hires." (*Exh.8*)

5. There were multiple candidates ranked below Mr. Matchem on the Certification who received offers of employment. (*Exhs.1, 9, 11 & 12)*

6. This appeal to the Commission duly ensued. (*Exh. 1;Claim of Appeal*)

Tattoo Policy

7. Pursuant to the authority vested in the BFD Fire Chief under Brockton Ordinances and BFD Rules and Regulations, in August 2019, the BFD promulgated a policy applicable to all future BFD hires, entitled "Department's Tattoo, Body Marking, Body Piercing, and Mutilation policy for new hires."(BFD Tattoo Police) (BFD Body Art Policy). (*Exhs.1 through 4, 12 & 14; PHExh.20; Testimony of Williams*)

8. The BFD Tattoo Policy states its purpose:

> "a. To establish a policy concerning the professional appearance of all employees and to ensure we are maintaining a professional image."
>
> "b. The Brockton Fire Department (BFD) has the responsibility of ensuring public safety, maintaining order, and attending to particularly vulnerable and sensitive persons, and to achieve these goals the public must trust and respect its firefighters. Maintaining a professional and uniform fire department is critical to advancing such public trust and respect."
>
> "c. Tattoos and body modifications, as forms of personal expression, are frequently symbolic in nature. These symbols and modifications are often displayed without words, which typically convey precise thoughts and meanings. Consequently, a tattoo or body modification's symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol or modification can be easily misinterpreted."
>
> "d. Misinterpretation of visible tattoos and other body modifications worn by firefighters while on duty can cause members of the public to question a firefighter's allegiance to the safety and welfare of the community, as well as the Department's. This misinterpretation can damage the public's trust and respect that is necessary for the Department to ensure public safety and maintain order."

(*Exh. 4*)

9. The BFD Tattoo Policy prohibits two categories of tattoos, brands and body art: (1) those which depict offensive subjects, such as racial, sexist or other similar hatred or intolerance, are prohibited, whether visible or not while on duty; and (2) tattoos, brands and body art (tongue splitting, disfiguring ears, nose and lips) on the face, head, neck or hands are prohibited if they are "visible to public view while wearing any department issued uniform." (*Exh. 4*)

10. An applicant who has a prohibited tattoo, brand or mutilation may remove it and be considered for appointment at a future date. The BFD also has indicated that, if a candidate removes a tattoo before the hiring cycle has been completed, reconsideration of an applicant may be possible. Several other candidates were bypassed based on non-compliance with the BFD Tattoo Policy. (*Testimony of Williams*)

11. The BFD proffered examples of similar tattoo policies adopted by the Brockton Police Department, the Lexington Fire Department, the Stoneham Fire Department; and the Massachusetts Department of State Police; Tattoo Policies of the United States Marine Corp, Navy, Army, Coast Guard and Air Force; and Article XXI, Personal Grooming and Appearance, Body Art" contained in the 2016-2019 Collective Bargaining Agreement between the Town of Duxbury and the Duxbury Permanent Firefighters Association. (*Exhs.10, 15 through 19*)

12. Chief Williams explained that the BFD Tattoo Policy prohibited tattoos on the face, neck and hands and that covering those marking would not be acceptable because, in part, that would raise safety issues. At my request, the BFD produced additional documents containing general orders, memos, bulletins and other similar communications related to BFD uniform requirements, appropriate attire and appearance, fitting and testing firefighters for face masks and the prohibition of facial hair which may impact the proper sealing of such masks. (*PHExh.20; Testimony of Williams*)

13. The Appellant pointed to the fact that three current BFD firefighters have tattoos, brands or body art of the type that the BFD Tattoo Policy prohibits and BFD has never received any complaints about them from the public. (*Testimony of Chief Williams*)

14. Chief Williams acknowledged that current BFD firefighters had non-complying tattoo but offered two explanations for the "new hires only" approach. First, he wanted to take a "proactive" approach rather than wait until he got complaints. Second, the BFD was party to a collective bargaining agreement with the local firefighters' union and he was legally prevented from applying the policy to current firefighters who are union members until Brockton engaged in "impact bargaining" with the union. Chief Williams intends to expand the application of the BFD Tattoo policy to all BFD members and will place that issue on the agenda in the next round of collective bargaining with the union. (*Exh.1; Testimony of Williams*)

15. Mr. Matchem has multiple tattoos, none of which fall into the offensive category that would be strictly prohibited. He has visible tattoos on his face, neck and hands. He also has excessive ear stretching. (*Exhs.1 & 4*)

16. Mr. Matchem's BFD application ascribed the following meanings to his tattoos:

- Front neck – candlestick represents honor and light
- Left face/neck – lit torch represents "liberty enlightening the world" representing a positive life; Woman's head is a classic style in tattoo imagery standing for good luck and the wings of her hair represent strong independence; "Torches together" is from Judges 15:4 representing the power and positive outcome of teamwork; Two upside down triangle [sic] joined together stands for a strong bond between mother and son in Celtic origins
- Right face/neck – umbrella represents Leviticus 19:11, "You shall not steal, nor deal falsely, nor lie to one another." For protection under God's protective umbrella; Cherry blossom represents the beauty of life; Rocket ship was drawn by my son, he dreams to be an astronaut and I wanted to show my encouragement to follow your dreams; Deer represents my son's favorite animal; Water drops are a part of a tattoo of a wolf on the side of my head which is unable to be seen. The wolf represents guardianship and loyalty.

- Right hand – Bottle containing liquid represents the popular expression "glass half full or half empty" with the words "quite the ride" expressing an outlook on a positive life; VW logo
- Left hand – blue and yellow ribbon in support of the Boston marathon bombing victims; deep sea diving helmet in honor of all my family members who have served in the U.S. Navy; "Deep Trouble" the title of my favorite childhood book by R.L.Stine.
- Knuckles (right to left hand) – Top knuckles "INVA-SION"; bottom knuckles "Itsa-trap" Both are popular phrases/sayings from the Star Wars franchise.

(*Exh. 4*)

17. One of the personal references provided by Mr. Matchem and interviewed by Dep. Chief Solomon recommended Mr. Matchem as a "great kid, hardworking", but when asked about any weaknesses, stated: "Tattoos". (*Exh. 7; Testimony of Solomon*)

18. Mr. Matchem signed the BFD Tattoo Policy and complied with the requirement to disclose all tattoos, whether visible in uniform or not. He wrote a letter to Brockton indicating that he "acknowledges and respects the policy", he does not agree with it and that he signed the policy under duress. (*Exhs. 1 & 4*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev.den.,423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top

candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003).

"Reasonable justification . . . 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' ". Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211,214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission "cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are *"*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,

then the occasion is appropriate for intervention by the commission." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L.c.31,§2(b), also gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action"; it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." Id.

ANALYSIS

The parties do not dispute most of the material facts presented in this appeal. They agree, in essence, that the issue before the Commission is whether the BFD Tattoo Policy is discriminatory on its face and unlawful under civil service law. I answer that question in the negative. [3]

The Validity of the BFD Tattoo Policy As A Matter of Law

The Commission is persuaded that the BFD has established, by a preponderance of evidence, that the adoption of the BFD Tattoo Policy is rationally related to legitimate purposes of maintaining order and a uniform and professional image of the BFD that the public will trust and respect, and preserving public confidence in the ability of the BFD to maintain public safety and attend to particularly vulnerable and sensitive persons. The Commission must give appropriate deference to what a public safety department believes to be necessary to regulate its mission and achieve those goals. The Commission cannot begin to micromanage the application of this policy and substitute its judgment for that of the BFD, as the Appellant effectively as us to do, at least so long as the policy does not intrude on constitutional rights, which is not the case here.

[3] The Appellant initially also claimed that the BFD Tattoo policy was unlawfully promulgated by the BFD Fire Chief without approval from the Mayor and City Council, but did not press that clam or argue it in the Appellant's Post-Hearing Proposed Decision. (*See Appellant's Proposed Decision, pp.7-8*) This question would be a matter of municipal law which is not within the purview or expertise of the Commission and I do not need to address it in this Decision.

As a general rule, police and fire safety departments, commonly referred to as "para-military" organizations, are authorized to regulate the appearance and conduct of its members. As shown by the evidence in this appeal and the weight of judicial authority, for reasons of ensuring safety as well as "good order and discipline," State and municipal police and fire service officers may be ordered, and are lawfully required, to strictly adhere (from head to toe) to dress codes that require specific uniforms and compel on-duty compliance with standards of personal hygiene and appearance, including limitations on adornment of their uniforms as well as conforming to head and facial hair protocols. See, e.g., Kelly v. Johnson, 436 U.S. 238 (1976) (hair grooming); Daniels v. City of Arlington, 246 F.3d 500, *cert.den*., 534 U.S.951 (5th Cir. 2001) (jewelry; "no pins"); Weaver v Henderson, 984 F.2d 11 1st Cir. 1993) (Mass. State Police "no mustache"); Risk v. Burgettstown Borough, 2007 WL 2782315 (W.D.Pa.) (no pins); cf. Cloutier v. Costco Wholesale Club, 390 F.3d 126 (1st Cir. 2004), *cert.den*., 1131 (2005) (private employer restricting facial jewelry); Willingham v. Macon Teleg. Pub. Co., 507 F.2d 104 (5th Cir. 1975) (private employer hair length rule applied to job applicants); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C.Cir. 1973) (private employer grooming standards); Morris v. Texas & Pac RR Co., 387 F.Supp. 1232 (M.D.La. 1975) (railroad employee hair length rule).

Tattoos and body art long have been included as the subject of regulation by the Federal military services, the Massachusetts State Police, and numerous municipal police and fire departments for many years. Although tattoos present unique issues and are not completely immune from constitutional scrutiny, as a general rule, the authority of law enforcement agencies to appropriately regulate tattoos and body art that its members (or applicants) chose to embed and display on their bodies is well-established. See, e.g., Scavone v. Pennsylvania State Police, 501 Fed.Appx. 179 (3d Cir. 2012) (rejecting state police applicant with tattoo); Inturri v. City of

Hartford, 165 Fed.Appx. 66 (2d Cir. 2006), *aff'g*, 365 F.Supp.2d 240 (D. Conn. 2005) (police officer tattoos); Medici v. City of Chicago, 144. F.Supp.2d 984 (N.D.Ill. 2015), *remanded,* 856 F.3d 536 (7th Cir. 2017) (police officer tattoos); Riggs v. City of Forth Worth, 229 F.Supp.2d 579 (N.D.Tex. 2002) (police officer tattoos). See also Stephenson v. Davenport Comm. School Dist., 110 F3d 1303 (8th Cir. 1997) (student with tattoo); Equal Employment. Opportunity Comm'n v. Red Robin Gourmet Burgers, 2005 WL 2090677 (private employee with tattoo)

With this background in mind, I turn to the Appellant's two Federal constitutional claims.[4]

Free Speech Under the First Amendment

As a threshold matter, the question arises whether the BFD Tattoo Policy is properly analyzed under the standards governing the limitations on freedom of speech by public employees, under the line of cases beginning with Pickering v. Board of Educ., 391 U.S. 563 (1968), or whether tattoos are more properly evaluated as adornments to law enforcement uniforms and appearance, governed by the line of cases emanating from Kelly v. Johnson, *supra.*

On the one hand, there is some authority that tattoos should be treated as "pure speech", those cases arise mainly in the context of zoning appeals which challenge the validity of restriction on the business of operating a tattoo parlor. See Jucha v. City of North Chicago, 63 F.Supp.3d 2014 (N.D.Ill. 2014) (tattoos are akin to paintings, drawing and writings created in other media that are

[4] It appears that the Massachusetts courts have not been presented with a case that requires deciding the lawful scope of public or private employer regulation of tattoos in the workplace and the Appellant does not specifically raise claims under Massachusetts law or the Massachusetts Declaration of Rights. Based on the related Massachusetts judicial precedent involving similar issues of free speech, I infer that the Massachusetts courts would closely follow Federal precedent in assessing the regulation of tattoos under Massachusetts law. See, e.g., Antonellis v. Department of Elder Affairs, 98 Mass.App.Ct. 251 (2020) (interpreting Federal constitutional law in employee free speech claim); Atterberry v. Police Comm'r, 392 Mass. 592 (1984) (validity of Boston Police regulation under Federal and Massachusetts constitutional law, applying Kelly and Pickering line of U.S. Supreme Court cases); Perriera v. Commissioner of Social Services, 432 Mass. 251 (2000) (same; First Amendment, Massachusetts Constitution and common law claims); Howcroft v. City of Peabody, 51 Mass.App.Ct. 573 (2000) (police officer's free speech claim; Federal constitutional and Massachusetts civil rights laws); Rowe v. Civil Service Comm'n, Suffolk C.A. 2019-3005 (Sup.Ct. 2021), *appeal pending* (free speech issues involving Boston firefighter)

undeniably protected"; city may regulate tattoo parlor by zoning restrictions on speech "reasonable [in] time, place and manner"; Colman v. City of Mesa, 230 Ariz. 352 (2012) (tattoos are "pure speech" and the "process of tattooing' is no less protected under the First Amendment than "the art of writing is no less protected than the book it produces, nor is painting less an act of free speech than the painting that results"); Voight v. City of Medford, 22 Mass.L.Rptr 122 (Middlesex Sup, Ct. 2007) (tattooing is protected art form under First Amendment). On the other hand, for purposes of analyzing the validity of restricting display of tattoos by on-duty law enforcement, I find the better approach is to view them, not as a "form of speech on matters of public concern" but, rather, as comparable to regulation of appearance and/or adornments on an officer's uniform. E.g., Inturri. City of Hartford, 165 Fed.Appx. 66 (2d Cir. 2006); Stephenson v. Davenport Comm. School Dist., 110 F.3d 1303 (8th Cir. 1997); Medici v. City of Chicago, 144 F.Supp.3d 984 (N.D. Ill. 2013), *remanded*, 850 F.3d 530 (7th Cir. 2017); Riggs v. City of Fort Worth, 229 F.Supp.2d 572 (N.D. Tex. 2002) This approach also makes sense considering that, a police officer or firefighter on-duty and in uniform, "speaks not as a citizen . . . but instead as an employee . . . ." and therefore, cannot get past even the first prong of the Pickering test. Daniels v. City of Arlington, 246 F.3d 500, 503-504 (5th Cir.), cert.den., 534 U.S. 951 (2001)

Under this approach, the law enforcement officer asserting a violation of constitutional rights bears the burden to establish that the restriction serves "no rational purpose" as a legitimate means for the enforcement or exercise of the law enforcement agency's police powers. In Kelly v. Johnson, 425 U.S. 238, 247-48 (1978), the Supreme Court upheld a police department's grooming regulation, stating:

> ". . . Choice of organization, dress and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices

> designed to promote other aims within the cognizance of the State police power . . . [T]he question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent [police officer] can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property. [Citations]"
>
> ". . . Neither this Court, the Court of Appeals, nor the District Court is in position to weigh the policy arguments in favor or against a rule regulating hairstyles as part of regulations governing a uniformed civilian service. . . .This choice may be based on a desire to make police officers readily recognizable to members of the public or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself. Either one is a sufficiently rational justification for regulations so as to defeat respondent's [police officer's] claim . . . ."

See also DePhilippis v. United States, 567 F.2d 341, 344 (7th Cir. 1977) (Pell, C.J, dissenting) (court should continue order granted pre-Kelly v. Johnson enjoining U.S. Marine Corp from prohibiting reservists to wear wigs to cover long hair, citing Justice Jackson's observation that: "judges are not given the task of running the Army" in Orloff v. Willoughby, 345 U.S. 83, 93 (1951))

Indeed, because a law enforcement officer on-duty and in uniform is a symbol of the state police power, restrictions that might be improper for private employers to impose on their employees are justified, indeed even compelled because of the public image that a law enforcement officer projects. For example, in Daniels v. City of Arlington, 246 F.3d 500, 503-504 (5th Cir.), cert.den., 534 U.S. 951 (2001), the U.S. Court of Appeals upheld the city's "no pins" policy, that prevented police officers from displaying any form of pins on their uniforms, even a small gold cross that symbolized an officer's evangelical Christian faith:

> " '[a] police officer's uniform is not a forum for fostering public discourse or expressing one's personal beliefs . . .'
>
> . . .
>
> "The content of [the officer's] speech – conveyance of his religious beliefs – is intensely personal in nature. Its form melds with the authority symbolized by the police uniform, running the risk that the city may appear to endorse [the officer's] religious message."

Id. 246 F.3d at 502-504. See also, Risk v. Burgettstown Borough, 2007 WL 2782315 (W.D. Pa.) (prohibiting officer from wearing small cross pin as a sign of his strong Christian faith).

In weighing the rational interest of law enforcement agencies to promulgate a broad, preemptive policy under the police power to regulate the appearance of their officers while on-duty and in uniform, it also bears notice, as the BFD Tattoo policy expressly recited, that tattoos involve a very wide range of symbolic images that the bearer may intend to convey one idea, or no idea, but which another person might misinterpret.

> "Tattoos, as a form of personal expression, are frequently symbolic in nature. These symbols are often displayed without the use of words, which typically convey precise thought and meanings. Consequently, a tattoo's symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol can be easily misinterpreted. The idea that meanings of symbols can often be confused is demonstrated by the case of *Stephanson v. Davenport Community School District*, where a high school student's modest hand tattoo was interpreted as a gang symbol . . . While the student maintained that the cross, tattooed between her thumb and index finger, was not a religious or a gang symbol, her high school attributed its own meaning to the symbol. . . ."

Medici v. City of Chicago, 144 F.Supp.3d 984, 988-89 (N.D. Ill. 2013), *remanded*, 850 F.3d 530 (7th Cir. 2017). See also, Inturri v. City of Hartford, 365 F.Supp.2d 240, 244-47 (D.Conn. 2005), *aff'd*, 165 Fed.Appx. 66 (2d Cir. 2006) (police officer's spider tattoos meant to be purely decorative but conveyed an unintended racist meaning to certain populations); Jucha v. City of North Chicago, 63 F.Supp.3d 820, 828 (N.D.Ill. 2014) ("regardless of a tattoo's content, merely having a tattoo can express a message to one's fellow members of society")[5]

Finally, the Appellant fairs no better under a "free speech" analysis as set forth in Pickering v. Board of Educ., 391 U.S. 563 (1968) and its progeny. As I concluded above, a law enforcement officer in uniform and on duty does not speak as a "citizen" within the meaning of the first prong

[5] The evidence in the appeal is another example of how a particular tattoo may carry a one meaning to the person wearing the tattoo which no one else understands in the same way. For example, the Words "Deep Trouble' "INVA-SION" and Itsa-trap" may seem benign to the Appellant, but could invoke a fearful response in another person.

of Pickering. See,.e.g., Garcetti v. Ceballos, 547 U.S. 410 (2006)[6] Similarly, since there was no actual testimony to explain the matter of "public concern" on which the Appellant's tattoos were meant to express an opinion, the Appellant fails the second Pickering prong as well. Indeed, by his own admission, many of the tattoos represented his private "self-expression" about his favorite children's book, his family, or his interest in Star Wars films, a far cry from what is required to establish speech on a topic of "public concern". See, e.g., Connick v. Myers, 461 U.S. 138 (1983). Moreover, even if one or more of the Appellant's body markings could arguably be considered to address matters of "public concern", most of them patently do not, so the Appellant's case also founders on the Mt. Healthy 'but for" test. See Mt. Healthy City School Dist., 429 U.S.274 (1977) Lastly, for the reasons fully explored above, the BFD has met it burden to show a legitimate governmental interest served by the BFD Tattoo Policy, which includes, in particular, the interest in maintaining public trust while serving a vulnerable population, the importance of maintaining good order and discipline, and the public safety issues that preclude allowing a firefighter to cover his tattoos while on-duty and wearing his uniform.[7].

Equal Protection Under the Fourteenth Amendment

The Appellant makes what amounts to a "class of one" equal protection argument, asserting that the BFD Tattoo Policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it only applies to new hires and treats similarly situated existing

[6] I am not persuaded by the Appellant's argument that, as an applicant for a public safety position, he is speaking as a 'citizen". The point of the BFD policy is to disclose the duties of an applicant as a uniformed fire service officer upon appointment. It is wrongheaded to evaluate the validity of the restrictions except as they apply to the ability to comply with those restrictions as an on-duty firefighter. See Scavone v. Pennsylvania State Police, 501 Fed.Appx. 179 (3d Cir. 2012)(state police applicant); Willingham v. Macon Teleg. Pub.Co., 507 F.2d 1084 (5th Cir. 1975 (job applicant)

[7] I do not overlook that, in the current COVID environment, it is likely that BFD firefighters now, temporarily, may be using PPE equipment that would possibly cover some (but not all) of the areas displaying the Appellant's tattoos. That does not provide sufficient reason to impugn the justification and validity of the BFD Tattoo Policy as established by the evidence and set forth in this Decision.

BFD firefighters differently. This claim can be addresses more summarily.[8] First, the "class of one" theory does not apply in the public employment context. Engquist v. Oregon Dep't of Agriculture, 553 U.S. 591 (2008). Second, a "class of one" equal protection claim requires that the Appellant must show that he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" which means that a government official acts "with no legitimate reason" for the decision. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Giordano v. City of New York, 274 F.23d 740, 750-52 (2d Cir. 2001). Here, the BFD applied the BFD Tattoo Policy uniformly to all candidates, bypassing several other candidates in addition to Mr. Machen for non-compliance with the policy. Third, while it is true that the policy is not being applied to current BFD firefighters, and several currently employed firefighters have tattoos that do not comply with the policy, the BFD stated a legitimate reason for limiting the BFD Tattoo Policy to candidates only, namely, it is prohibited, for the time being, from enforcing such a policy against current members under the terms of the collective bargaining agreement with the firefighters' union. See Scavone v. Pennsylvania State Police, 501 Fed.Appx. 179 (3d Cir. 2012) (rejecting state police applicant's equal protection claim); Tuskowski v. Grffin, 359 F.Supp.2d 225 (D.Conn. 2005). Indeed, grandfathering a new public safety requirement is a recognized justification for distinguishing among employees under civil service law. See, e.g., Personnel Administration Rules, PAR.23 Smoking Prohibition Rule (effective prospectively 10/6/1988). See also Jucha v. City of North Chicago, 63 F.Supp.3d 820 (N.D. Ill. 2014) (rejecting tattoo artists equal protection claim for being treated differently than others who were grandfathered under the zoning policy)

CONCLUSION

[8] The Appellant does not seriously argue, as there is no basis to do so, that he has a viable equal protection claim under a "protected class" or "selective enforcement" theory. (Appellant's Post-Hearing Proposed Decision, pp. 18-24)

For the reasons stated herein, this appeal of the Appellant, Cory Matchem, CSC Docket No. G1-19-234, is ***denied***.

Civil Service Commission

/s/Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

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.Lc.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:
Thomas E. Horgan, Esq. (for Appellant)
Karen Fisher, Esq. (for Respondent)
Patrick Butler, Esq. (HRD)