COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

GERALD MEUSE,
Appellant

v. G1-21-073

EVERETT FIRE DEPARTMENT,
Respondent

Appearance for Appellant: *Pro Se*
Gerald Meuse

Appearance for Respondent: Albert Mason, Esq.
56 Strong Road
Southampton, MA 01073

Commissioner: Christopher Bowman

SUMMARY OF DECISION

The Commission allowed the Appellant's bypass appeal for original appointment as a permanent, full-time firefighter and ordered his reconsideration based on the many procedural flaws in the Everett Fire Department's review process. Should the Department, going forward, utilize a review process that is consistent with the civil service and other relevant laws, nothing prevents the Department from proffering valid reasons to bypass the Appellant if those reasons are supported by a preponderance of the evidence.

DECISION

On March 30, 2021, the Appellant, Gerald Meuse (Appellant), acting pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Everett Fire Department (Department) to bypass him for original appointment to the position of permanent, full-time firefighter. On May 18, 2021, I held a remote pre-hearing conference followed by a remote full hearing on July 28, 2021.[1] The hearing was recorded via Webex and both parties received a link to access the recording.[2]

FINDINGS OF FACT

The Appellant entered five exhibits (Appellant Exhibits 1-5) and the Respondent entered eight exhibits (Respondent Exhibits 1-8) prior to the hearing. Subsequent to the hearing, the Respondent submitted additional documents, including an affidavit attached to a criminal complaint filed by Ms. A, who is a witness in this proceeding. I have accepted and entered this document as Post Hearing Exhibit A. Also, at my request, the Appellant submitted one (1) post hearing exhibit (Post Hearing Exhibit 2)and the Respondent provided two post hearing exhibits (Post Hearing Exhibits 1 and 3). Based upon the evidence and the testimony of the following witnesses:

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

[2] Should either party file a judicial appeal of this decision, the plaintiff is obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, electronic copy of the hearing recording, previously sent to the parties, should be used to transcribe the hearing.

For the Appellant:

- Ms. A.[3]
- Gerald Meuse, Appellant

For the City:

- Anthony Carli, Chief of Everett Fire Department
- Sabato LoRusso, Everett Fire Department
- Ms. S., Owner, Private Investigator[4]

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

1. At the time of the hearing, the Appellant was 31 years old. He is single and is the father of one child who does not permanently live with him. The Appellant joined the United States Navy soon after graduating from high school.[5] He was a member of the United States Navy from 2008 to 2014 and joined the Massachusetts National Guard in 2018. *(Testimony of Appellant)*
2. On May 18, 2019, the Appellant took and passed a military make-up civil service examination for firefighter, resulting in his name being added to an eligible list of candidates for Everett firefighter on June 6, 2019. *(Stipulated Fact)*[6]

[3] Consistent with the Commission's protocols regarding confidentiality, a pseudonym is used regarding any alleged victim of domestic violence whenever possible.
[4] Since the identity of this private citizen is not relevant to these proceedings, she is referred to as Ms. S throughout the decision.
[5] The Appellant did not testify as to when he graduated from high school or where he graduated from. His Department application lists two different high schools, one in Savannah, GA and one in Plaistow, NH. No dates of attendance were given. *(Resp. PH Ex. 1)*
[6] The original examination date was March 24, 2018 from which an eligible list was established on December 1, 2018. The Appellant requested to take the make-up examination on May 1, 2019. (Administrative notice of Appellant's NEOGOV account.)

3. On August 7, 2019, HRD issued Certification No. 06530 to the Department. The Appellant's name was ranked 11th on the certification, tied with one other candidate. The certification indicates that the Appellant applied for and received the statutory residency preference (in Everett) and the veterans' preference. *(Stipulated Facts and HRD Packet)*
4. To qualify for residency for the statutory residency preference under Section 58 of G.L. c. 31, candidates must have " … resided in a Department or town for one year immediately prior to the date of examination for original appointment." HRD uses the *original* date of the examination for residency preference calculations. Applied here, the applicable residency preference window would be March 24, 2017 to March 24, 2018, one year prior to the original date of examination. (G.L. c. 31, § 58)[7]
5. HRD provisions allow certain active military duty candidates to claim residency in the city or town where they resided immediately prior to their activation provided that they returned to live there, or in another Massachusetts city or town, after being discharged, up to 90 days after discharge.[8] (Administrative Notice)
6. On August 29, 2019, the Appellant submitted a signed application with the Department. At the same time, the Appellant signed a General Release, consenting to an investigation regarding his moral character, reputation and fitness for the position of Everett firefighter. *(Resp. PH Ex. 1)*

[7] As discussed in later findings and the analysis, the Everett Fire Department's investigator erred by using the date of the make-up examination to determine the residency preference window, erroneously seeking to verify if the Appellant resided in Everett from May 18, 2018 to May 18, 2019.

[8] As also discussed in later findings and the analysis, it appears that the Department and its investigator were either unaware of or ignored this HRD provision.

7. On or about September 5, 2019, the Appellant signed a credit check authorization and a CORI check acknowledgment that a Criminal Offender Record Information (CORI) inquiry would be performed as part of the Department's hiring process. *(Resp. PH Ex. 1)*
8. The Department contracted with Ms. S, the owner of an investigative company in New Hampshire, to complete the background investigations of each candidate. Her company undertakes pre-employment background checks for various employers, including appointing authorities such as Everett, Mashpee, Somerville, Malden and the Boston Fire Department. *Testimony of Ms. S)*
9. According to the Appellant's DD214, he was on active duty with the Army National Guard of Massachusetts from February 28, 2018 to July 21, 2018. *(App. Ex. 5, A0051)*

Job History Verification

10. As part of the Everett Fire Department application, the Appellant was asked to list his employment during the past 15 years. All time was to be accounted for and if he was unemployed at any time, he was required to account for those particular dates. *(Resp. PH Ex. 1)*[9]
11. The Appellant listed the US Army National Guard as his employer at the time of his candidacy. He had been so employed from February 2018 to September 2019. He listed the names of two supervisors and three telephone numbers. *(Resp. PH Ex. 1)*
12. The Appellant listed a casino as his employer from June 2019 to September 2019. He listed a main address of the employer as well as the name, telephone number, and email address of his supervisor. *(Resp. PH Ex. 1)*

[9] The Respondent did not submit the application as an exhibit prior to the hearing. I requested the document at the hearing and entered it as Respondent Post Hearing Exhibit 1.

13. The Appellant listed a ride share company as his employer from March 2016 to September 2019. He provided the address of this employer but indicated that he had "no supervisor." *(Resp. PH Ex. 1)*
14. The Appellant only listed three prior employers on his work history, dating back to March 2016, just three years prior to his 2019 application to the Department. He did not list any employers prior to 2016, even though he was asked to go back 15 years. *(Resp. PH Ex. 1)*
15. Under the Military Service section of the Application (not the prior employment section), the Appellant listed that he was a member of the U.S. Navy from February 7, 2008 to February 6, 2014 and that he was honorably discharged. The Appellant did not provide any contact information to the Department regarding his time in the Navy in the application. The DD214 for his service in the Navy was not admitted as an exhibit at this appeal.[10] *(Resp. PH Ex. 6)*
16. Also under the Military Service section of the Application, the Appellant indicated that he was discharged from the Army on June 24, 2018, yet he did not provide a start date.[11] *(Resp. PH Ex. 1)*
17. The Department presented no evidence that their investigator contacted the Army National Guard to discuss his current service/employment in the military.[12] *(Testimony of Ms. S)*

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[10] Neither the Respondent nor the Appellant presented the Appellant's DD214 relative to his service in the Navy as an exhibit in this appeal. The first page of the Appellant's Application, which he signed, indicates that he was required to provide all DD214s to the City. That document is not in evidence relative to the Navy. It is in evidence relative to the Army National Guard. *(App. Ex. 5)*

[11] In the Military Service section of the Application, the Appellant seems to have combined dates and information relative to his military service in a manner that is not easily understood – he has served in the Navy and the Army, yet in that section, he does not make it clear which branch of the military he is documenting so it is difficult for the reader to comprehend that sheet. *(Resp. PH Ex. 1)*

[12] The Appellant testified that the investigator told him she could not contact the Air National Guard, yet the Appellant testified that the investigator had transcribed the phone number incorrectly from the one he provided to the Department in his Application. He believes this is

18. Ms. S. acknowledged that the Appellant did provide contact information for the casino where he was employed, but she recalls that the contact number was inaccurate. In regard to the ride share company, Ms. S did not attempt to contact anyone based on her prior experience that it was difficult to identify a contact person for a ride share company. *(Testimony of Ms. S)*

Residency Verification

19. As referenced above, the Appellant could qualify for residency preference in Everett if: a) he resided continuously in Everett from March 24, 2017 to March 24, 2018; or b) he resided in Everett immediately prior to his military activation and returned to live in Everett or in another Massachusetts city or town within 90 days after his military discharge. The Department's investigator erroneously relied on the date of the make-up examination and focused her review on whether the Appellant resided in Everett from May 8, 2018 to May 8, 2019. Further, she did not consider whether the Appellant qualified for residency under the HRD provisions related to active military duty candidates referenced above. (Testimony of Ms. S)
20. On the final page of his application, the Appellant attached a typed addendum to further elaborate on his residency during the past ten years. *(Resp. PH Ex. 1)*
21. The Appellant began active-duty training at Fort Bennington TC, Georgia on February 28, 2018. *(App. Ex. 5)*

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why contact could not be made, through no fault of his own. *(Testimony of Appellant; App. Ex. 2)*

22. At the time of his departure for active duty, the Appellant indicated that he was living at both an address in Everett and an address in Revere. He said he "was living there at the same time." *(Resp. PH Ex. 1)*
23. His addendum page states that he lived at the Revere address from November 2017 to February 2018 and the Everett address from March 2015 to February 2018. *(Resp. PH Ex. 1)*
24. The Appellant's active duty in Georgia ended on July 21, 2018. *(App. Ex. 5)*
25. The Appellant did not return to Massachusetts after he left Georgia; rather, the Appellant resided in New Hampshire from July 2018 to May 2019. *(Resp. PH Ex. 1)*
26. In his addendum to the application, the Appellant also stated that he lived at a veteran's shelter in Boston from March 2019 to May 2019. The addendum states that he lived at the New Hampshire address and the Boston shelter at the same time because, as he stated: "My reason for not leaving MA permanently was my commitment to the MA National Guard and also wanted to keep my state residency for hope of the Fire Department job for residency status since I missed the exam while on Active duty."[13] *(Resp. PH Ex. 1)*
27. The Appellant produced three pieces of mail that were sent to the Everett address from the military – in 2015 and 2017 – and one other letter dated April 5, 2019. *(App. Ex. 5)*
28. The Appellant produced automobile insurance documents to show that he garaged his vehicle in Everett from November 23, 2017 to November 23, 2018 and then again beginning in March 28, 2019 through September 28, 2019. *(App. Ex. 4)*

[13] During his testimony before the Commission, the Appellant referenced additional locations where he purportedly resided beyond those listed on the addendum page of his application. He testified that that he moved from the address in Everett to the shelter in Boston and, after a few months at the shelter, he lived with a friend in Melrose, then back to Everett again, and then to Somerville. He said he "was transient during that time." *(Testimony of Appellant)*

29. The Appellant produced excise tax records for the years 2015 through 2018 which indicate that he paid excise tax to the Department. He did not produce any document to show that he paid excise tax to Everett in 2019. The mailing address for the excise tax document, however, was a Charlestown address. *(App. Ex. 4)*
30. The Appellant did not provide the Department with any utility bills, to include any gas or electric bills, from the time he claimed residency at the Everett address. *(Testimony of Appellant)*[14]
31. The Everett residence (2 units) was owned by the father (Mr. N) of the Appellant's friend. According to the Appellant, the building was sold in 2014. (*Testimony of Appellant)*
32. The Appellant listed Mr. N as a personal reference on his application. The Department's investigator spoke to Mr. N. However, the investigator did not make the connection that Mr. N was also purportedly the Appellant's landlord at the address in Everett, so no discussion occurred relative to the Appellant's claimed residency in Everett. *(Testimony of Appellant; Resp. PH Ex. 1; App. Ex. 2)*

Issues Regarding Appellant's Criminal History

33. As part of the application, the Appellant was asked: "Have you ever been, or are you now, a defendant in any civil or criminal court action?" The Appellant responded to that question with a check mark in the "Yes" box and an X mark in the "No" box. *(Resp. PH Ex. 1)*
34. If the candidate answered with a "Yes," he was to provide information relative to the nature of the action, the court and the docket number. The Appellant wrote: Simple assault 11/2011, Norfolk Police Department, VA, Norfolk Probate Court/District. At the bottom of the page,

[14] The Appellant testified that he had a cell phone while he resided in Everett. I asked him to submit a copy of the cell phone bills to the Commission. He failed to submit the documents.

he also added: "Case dismissed (sic) was not arrested (sic) argument with [redacted][15]." He then provided her name and phone number. *(Resp. PH Ex. 1)*

35. The CORI report obtained by Ms. S showed that the Appellant had no criminal history in Massachusetts. *(Testimony of Ms. S)*
36. Ms. S. also routinely checks with the District and Superior courts in the counties that the candidates list as their former and current residences. *(Testimony of Ms. S)*
37. The inquiry to the courts in Virginia produced documents that referenced a 2011 arrest for a misdemeanor offense. *(Testimony of Ms. S; Resp. Ex. 1 & 3)*
38. According to the Norfolk, VA Police Department police report, a warrant was issued for the Appellant's arrest on November 21, 2011 for Assault and Battery – Family. *(Resp. Ex. 1 &3)*
39. Additionally, the Virginia court inquiry revealed that an Emergency Protective Order issued on November 21, 2011. Ms. A was named as the plaintiff and the Appellant was listed as the defendant. The documents show that a Writ of Possession was also issued also against the Appellant for the recovery of certain items of personal property that he had in his possession. *(Resp. Ex. 1 & 3)*
40. According to the Norfolk police report, the Appellant was arrested for Assault and Battery-Family on November 25, 2011 at 6:47 AM and was released from custody at 8:22 AM. *(Resp. Ex. 1 & 3)*[16]
41. The Court documents reviewed by the Department also show that a Warrant of Arrest-Misdemeanor (State) was issued in Norfolk County Juvenile and Domestic Relations Court

[15] The information redacted here contains information which references the relationship between the Appellant and Ms. A which could inadvertently reveal the identity of Ms. A. For that reason, it is redacted.

[16] The Appellant testified before the Commission that he was not arrested but that he was indeed charged with a crime. *(Testimony of Appellant)*

on November 21, 2011. The warrant stated that any authorized officers were "commanded in the name of the Commonwealth of Virginia to arrest and bring the accused before this Court to answer the charges that the accused, on November 20, 2011, did unlawfully violate Section 18.2-57.2, Code of Virginia." The Court found probable cause to believe the accused committed the offense charged based on the sworn statement of Ms. A. *(Post Hearing Exhibit A)*

42. The Department also reviewed the Criminal Complaint filed by Ms. A against the Appellant on November 21, 2011. In her sworn statement, Ms. A wrote the following:

> "The accused is [redacted] and [redacted] and he has recently become violent in the discovery [redacted]. He has pushed me on my stomach with his feet and shoved me against the wall multiple times. He has threatened my life [redacted] and has increasingly become
> more mentally abusive." *(Post Hearing Exhibit A)*[17]

43. The documents reviewed by the Department also show that the Appellant appeared before Judge William P. Williams on Case No. X-110222-01-00 in the Norfolk Juvenile and Domestic Relations District Court- Courtroom #1 on March 26, 2012, July 30, 2012, and November 5, 2012 relative to a November 2011 arrest. These records show that, on that final date, the Assault and Battery-Family charges against the Appellant were dismissed. *(Post Hearing Exhibit A)*

[17] The information redacted here contains information which references the relationship between the Appellant and Ms. A which could inadvertently reveal the identity of Ms. A. For that reason, it is redacted.

44. As part of their investigation into the Appellant's background, an employee of Ms. S's company, Ms. M, contacted Ms. A, the alleged victim of the 2011 assault. They spoke over the telephone on or about September 19, 2019. *(Testimony of Ms. S)*[18]

45. According to Ms. M's report, Ms. A, during the phone interview, stated that the Appellant " … put his hands on me with the intention of [redacted][19]. I was afraid of him and called the police." Ms. M's report also states that Ms. A. told her that the Appellant then left her home; he was not arrested at that time; and, with her assent, the subsequent criminal charges against the Appellant were ultimately dropped as Ms. A did not want to "ruin [the Appellant's] career." *(Testimony of Ms. S; Resp. Ex. 7)*[20]

46. The Appellant listed Ms. A as a personal reference on his application. Notwithstanding the above, Ms. A also told Ms. M, the investigator, that the Appellant would be a "good firefighter" because he is physically strong and resilient. *(Testimony of Ms. S; Resp. Ex. 7)*

47. As part of her investigation, Ms. M received information that the Appellant, who has a child for whom he does not have custody, only pays child support sporadically and that he has helped the custodial parent one time with a partial security deposit. (*Testimony of Ms. S; Resp. Ex. 7)*[21]

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[18] Ms. M did not testify before the Commission. Rather, Ms. S, the owner of the investigative company, testified to the contents of Ms. M's memorandum relative to her conversation with Ms. A, the alleged domestic violence victim. *(Testimony of Ms. S; Resp. Ex. 7)*

[19] The information redacted here contains information which references the relationship between the Appellant and Ms. A which could inadvertently reveal the identity of Ms. A. For that reason, it is redacted.

[20] Ms. A testified before the Commission. She denied that the Appellant ever assaulted her; she denied calling the police; and she denied making the statements attributed to her in Ms. M's investigative report. For the reasons discussed in the analysis, I did not credit any of this sworn testimony by Ms. A.

[21] The Appellant testified at the hearing before the Commission that he makes regular child support payments, typically $700 dollars per month. He estimated that he has paid over $75,000

48. On or about September 24, 2019, as part of their investigation for the Department, Ms. S and company co-owner (Mr. D) made a home visit to the Appellant's residence in Melrose. The Appellant did not appear to be ready for the home visit, even after Ms. S had made multiple phone calls and left voice mails to ensure that the Appellant would be home for the visit. He appeared to Ms. S as though he had just woken up. *(Testimony of Ms. S)*
49. During that visit, Ms. S did not give the Appellant copies of the arrest reports or any other police or court documents that she had acquired during the investigation. The Appellant was asked about the Virgina incident in 2011 when he was arrested. When asked if he ever assaulted anyone in November 2011, the Appellant said he had not, and it was all a misunderstanding. He stated that he was never actually arrested. *(Testimony of Ms. S)*

Decision to Bypass

50. Upon completion of the investigation, Ms. S provided the Fire Chief with a copy of her findings and discussed the Appellant's candidacy with the Chief at a roundtable discussion, attended by another Department employee, as well. *(Testimony of Ms. S)*
51. Ms. S told the Fire Chief that she had reached the conclusion that the Appellant had lied to her about the domestic violence incident, based on what Ms. A told Ms. M during the phone interview and conveyed the difficulty that she and her employees had verifying the Appellant's residency. *(Testimony of Ms. S; App. Ex. 2)*
52. The Department ultimately appointed eighteen (18) firefighter candidates, ten (10) of whom were ranked below the Appellant. *(Stipulated Fact)*

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in child support over nine years. The Appellant testified that he paid via Venmo, MoneyGram, and sometimes direct deposit. I asked the Appellant to submit any documentation to show proof of any child support payments. He failed to submit any documentation.

53. On or about March 11, 2021, Everett Fire Chief Anthony Carli notified the Appellant that he had been bypassed, determining he was not a suitable candidate for the position of firefighter for the following reasons:

> 1. The investigator's report states Mr. Meuse's job history before and after he left the military is hard to verify.
> 2. Mr. Meuse claims to have lived in Everett from 2015-2018 at [redacted]. He also claims the home was owned by a friend… who has since sold the property. The investigators found no proof that Mr. Meuse lived there.
> 3. Mr. Meuse claimed he was never arrested for an assault, but was in fact arrested.
> 4. Mr. Meuse claimed he was never arrested for a violation of restraining order, but was in fact arrested.
> *(Administrative Record)*[22]

Legal Standard

Section 2(b) of G.L. c. 31 authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the state's Human Resources Division (HRD) or, in certain cases, by appointing authorities to whom HRD has delegated its authority, and which actions have abridged their rights under civil service laws. The statute provides:

> *No person shall be deemed to be aggrieved* . . . *unless such person has made specific allegations* in writing that a decision, action, or failure to act on the part of the administrator [HRD] was in violation of this chapter, the rules or basic merit principles promulgated thereunder *and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status*. Id. (*emphasis added*)

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the Commission to remediate a violation of civil service law:

> *If the rights of any person* acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder *have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights* notwithstanding the failure of any person to comply with any requirement of said chapter

[22] Neither party submitted a copy of the bypass letter as an exhibit. A barely legible letter was attached to the Appellant's appeal form.

thirty-one or any such rule as a condition precedent to the restoration or protection of such rights. (*emphasis added*)

The fundamental mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31, which command, among other things, "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" 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. A mechanism for ensuring adherence to basic merit principles in hiring and promotion is the process of conducting regular competitive qualifying examinations, open to all qualified applicants, and establishing current eligible lists of successful applicants from which civil service appointments are to be made based on the requisition by an appointing authority of a "certification" which ranks the candidates according to their scores on the qualifying examination, along with certain statutory credits and preferences. G.L. c. 31, §§ 6 through 11, 16 through 27. In general, each position must be filled by selecting one of the top three most highly ranked candidates who indicate they are willing to accept the appointment, which is known as the "2n+1" formula. G.L. c. 31, § 27; PAR.09.

In order to deviate from the rank order of preferred hiring, and appoint a person "other than the qualified person whose name appears highest", an appointing authority must provide written reasons – positive or negative, or both – consistent with basic merit principles, to affirmatively justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L. c. 31, §§ 1 and 27; PAR.08. A person who is bypassed may appeal that decision under G.L. c. 31, § 2(b) for a de novo review by the Commission to determine whether the bypass decision was based on a "reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and was "reasonably justified". Police Dep't of Boston v.

Kavaleski, 463 Mass. 680, 688 (2012), citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006). and cases cited; Beverly v. Civil Service Comm'n 78 Mass. App. Ct. 182 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

Analysis

The proceedings regarding this appeal were more challenging and unorthodox than usual. The Department's lack of preparedness contributed to that. Until prompted to do so, the Department failed to submit highly relevant documents into evidence including, but not limited to, the Appellant's application for employment and a highly relevant affidavit associated with a criminal complaint filed by Ms. A, the alleged victim of domestic violence. Further, the Department's Fire Chief, who is the appointing authority and witness, clearly had not made plans to give his undivided attention to the proceedings before the Commission, as he was not in his office or other suitable location that would facilitate the taking of remote testimony. Finally, the person who actually interviewed Ms. A was not called as a witness by the Department, forcing the Department to offer the double hearsay testimony of the interviewer's supervisor, Ms. S. Also, based on a review of the record, as referenced in more detail below, there were numerous procedural and substantive deficiencies in the Department's review process involving the Appellant.

For different reasons, the Appellant's presentation was also problematic. Importantly, there are instances in which the Appellant offered sworn testimony that he could not support through documentary evidence. For example, the Appellant testified that he had regularly made child support payments of $700 per month and went on to speculate that he had paid a total of $75,000 in child support payments over a nine-year period. Even standing alone, this testimony

did not seem credible to me. Further, it was contrary to other evidence in the record and also seemed to contradict other portions of the Appellant's testimony regarding financial challenges he has faced. I provided the Appellant with the opportunity to submit any documentation to support his testimony that he made any child support payments. No supporting documentation was received.

The Appellant called Ms. A to testify before the Commission and I infer that he anticipated that she would effectively retract: a) a sworn statement she made as part of a criminal complaint filed against the Appellant, in which she wrote that the Appellant had pushed and shoved her and threatened her life; and b) the purported statements that she made to Ms. M (i.e. – stating that the Appellant did make physical contact with her as part of an argument which caused her to file the criminal complaint). This is not the first time during my tenure on the Commission that an alleged victim of domestic violence has testified before the Commission and recanted their prior written and oral statements alleging abuse. Here, as with those prior decisions, I take administrative notice of the state's Guidelines on Domestic Violence, which state that it is not uncommon for victims of domestic abuse to recant their statements for various reasons. After carefully listening (and re-listening) to the testimony of Ms. A, I have concluded that Ms. A sought to recant her prior statements solely for the purpose of assisting the Appellant in his desire to be a firefighter, as opposed to providing an accurate recollection of the events in question. Below, I have provided a more detailed explanation of the problematic nature of this appeal as it relates to each of the reasons put forth by the Department for bypassing the Appellant.

Bypass Reason 1: Difficulty Verifying Job History

At the time of his application to the Department, the Appellant did not have a lengthy civilian employment history outside of his military service. The Department's third-party investigators, however, gave little effort toward verifying the Appellant's prior job history. He began his career in 2008 in the Navy. While the Appellant failed to list the Navy as a prior employer, he did list the Navy as part of his prior military service. There is no evidence in the record to show that any background investigator attempted to contact anyone from the Navy. There is no DD214 in the record of his Navy service, either. It does not appear the Appellant provided the Navy DD214, even though he was required to do so. There was no evidence as to why the Appellant left the Navy in 2014 and joined the Army in 2018.[23]

Additionally, there is no evidence to show that the Department contacted anyone from the Army or the Army National Guard relative to his service with them. The Appellant noted that the investigator had actually copied the phone number down wrong that he provided for them in their investigative summary. Perhaps that is why they have no information to offer relative to his Army references. Additionally, the investigator noted that the Appellant failed to provide a contact number for anyone at the ride share company. While this is true, the Appellant did provide an address. A little bit of digging, or some push back on the Appellant to provide a phone number, could have helped the Department obtain necessary information, at least to confirm that he has been employed by the ride share company since 2016.

There was a period of four years, between his service in the Navy and the Army, where the Appellant does not appear to have fully accounted for his employment (or lack thereof). No

[23] The Appellant should be required to produce his DD214 regarding his service in the Navy as part of any subsequent review of his candidacy.

evidence was presented by the Department that they discussed this gap in his employment history. The Appellant only lists one other employer, the casino. The investigator testified that she tried to call the casino reference that the Appellant listed on his Department application, but that number did not give her access to the named reference so she left it at that. The investigator testified that she did not call the human resources department at the casino and she was unsure if her co-worker called either.

In sum, the record presented a number of red flags that raise questions about the Appellant's candor and accuracy in referencing his prior military record and employment, including without limitation, a confirmation that Appellant was honorably discharged from the Navy and his employment history in the immediate period thereafter. Had the City been diligent in performing a reasonably thorough review of these matters, they may well have revealed legitimate reasons to bypass him. In the absence of that reasonably thorough review, however, the Commission cannot sustain this bypass on those grounds at this time.

Bypass Reason 2: Questions Regarding Residency

As part of this hiring cycle, the Fire Department, pursuant to G.L. c. 31, § 58, exercised the option to provide a residency preference to qualified candidates. To qualify for residency for the statutory residency preference under Section 58, candidates must have " … resided in a Department or town for one year immediately prior to the date of examination for original appointment." First, it appears that the Department used the wrong one-year window to determine if the Appellant met the residency preference requirement. Second, it appears that the Department was either unaware or ignored provisions related to candidates who are on active military duty during the (correct) residency preference window. In regard to the one-year period referenced in Section 58, HRD relies on the *initial date of examination*, not the date of the make-

up examination, for a start date. The Department erroneously used the one-year period prior to the date of the *make-up examination* to calculate the residency preference.

Further, the City, as part of its investigation, did not determine whether the Appellant qualified for the residency preference based on HRD provisions which allow certain active military duty candidates to claim residency in the Department or town where they resided immediately prior to their activation or where they began residing up to 90 days after discharge.

The Appellant, regardless of the correct calculation period, offered conflicting information regarding his residency. In the addendum of the Appellant's Department application, the Appellant has listed both an Everett address and a Revere address as his address when he left for active duty in February 2018. In the addendum, he wrote that he "was living there at the same time." The Appellant testified to additional locations where he slept, stated that he moved from the Everett address to a shelter for a few months, then to a friend's house in Melrose, then back to Everett again, then to Somerville. He went on to say that he "was transient at that time." In the addendum, the Appellant wrote that he lived at an address in New Hampshire from July 2018 through May 2019, in addition to staying in a shelter in Boston at times from March 2019-May 2019.[24]

The Appellant provided some proof that he paid excise taxes to the City of Everett in 2015, 2016, 2017 and 2018 and that he garaged his vehicle in the City of Everett from November 2017 through January 2019 and then again from March 2019 through September 2019. The excise tax taken alone, however, only shows that the Appellant garaged his car in Everett; not

[24] If the Appellant did reside in New Hampshire upon his discharge from the Army in July 2018 until May 2019, it would mean that his claim to a military exception to the one-year residency requirement is highly problematic. See residency-preference-for Civil- Service-police-and-fire-jobs

that he resided there. At the hearing before the Commission, the Appellant, when asked about utility bill payments, stated that he had a cell phone during the periods in which he purportedly lived in Everett. I asked that the Appellant provide the billing statements for that cell phone; he failed to submit the requested documents.

Finally, although the investigator spoke to the person who was purportedly the Appellant's landlord in Everett, the Appellant only identified that person as a personal reference. Therefore, the investigator never inquired with this person regarding the dates the Appellant was – or was not – a tenant at the Everett address.

In sum, this evidence also presented a considerable number of red flags that raise serious questions about whether the Appellant qualified for Everett residency, either on the basis of the one-year residency rule or the HRD military exception. Everett bears the burden of establishing that the Appellant's claim of residency was erroneous, and it failed to meet that burden. A more thorough review of the issue of residency may well produce a different conclusion.

Bypass Reason 3: Issues related to the Appellant's criminal history

The problematic nature of the review here continued in regard to issues related to the Appellant's criminal history and his responses to related inquiries. First, as stated in the findings, the written application used by the Fire Department asks all candidates: "Have you ever been, or are you now, a defendant in any civil or criminal court action?" Second, as part of the review process, the Department never provided the Appellant with a copy of the criminal records that it had obtained before making an adverse decision based in part on those records. Third, it is not precisely clear (at all) whether the Fire Department, *a non-criminal justice agency*, through an outside investigator, was permitted to obtain the criminal

records in question here. The problematic nature of the first two issues foregoes the need for the Commission to address whether the records were permissibly obtained.

G.L. c. 31, § 20 states in relevant part that:

> "No applicant shall be required to furnish any information in such application with regard to: any act of waywardness or delinquency or any offense committed before the applicant reached the age of 18 years; any arrest for a misdemeanor or felony which did not result in a court appearance, unless court action is pending; any complaint which was dismissed for lack of prosecution or which resulted in a finding or verdict of not guilty; or any arrest for or disposition of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application."

G.L. c. 151B, § 4 states that it shall be an unlawful practice:

> "9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276. (emphasis added)
>
> No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.
>
> Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.
>
> 9 1/2. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection

> 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses."

As referenced above, the Department's application asks: "Have you ever been, or are you now, a defendant in any civil or criminal court action?" The Commission has been clear that "broad questions . . . designed to obtain information from the applicant, beyond what is provided for under Chapter 151B, are not permissible." See Kodhimaj v. Department of Correction, 32 MCSR 377 (2019), and cases cited. See also St. Germain v. Massachusetts Bay Transp. Auth., 33 MCSR 222 (2020); McManus v. Waltham Fire Dep't, 33 MCSR 83 (2020); Pereira v. City of New Bedford, 32 MCSR 128 (2019).

An employer may ask a candidate about a specific matter which came to the employer's attention through an independent lawful source other than the candidate. However, no employer may directly or indirectly, ask a candidate for employment to disclose information about prohibited matters contained within G.L. c. 151B, §4 and may not penalize him or her for answering such a prohibited inquiry. Compare Kraft v. Police Comm'r of Boston, 410 Mass. 455 (1991) (police officer could not be terminated for providing a false answer to a prohibited matter (medical condition) covered by G.L. c. 151B, §4); Kerr v. Boston Police Dep't, 31 MCSR 35 (2018) (BPD impermissibly disqualified candidate for untruthfulness who answered "NO" to the question: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?") with Bynes v. School Comm. of Boston, 411 Mass. 264 (1991) (school committee lawfully obtained CORI information independently, not from

employee). See also, G.L. c. 151B, §4(5) (prohibiting "interference" with the exercise of c. 151B rights).

I now address the other problematic part of how the Department used the criminal records related to the Appellant.

Section 171A of G.L. c. 6, states in part:

> "In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source; provided, however, that if the person has provided the applicant with a copy of his criminal offender record information prior to questioning the person is not required to provide the information a second time in connection with an adverse decision based on this information."

The investigator employed by the Department acknowledged that the Appellant was not provided with a copy of his criminal records that the Department had obtained prior to the background interview and it appears that the Appellant was never provided with these records prior to being notified that he was being bypassed for appointment. The Commission has consistently ruled that background investigators, when reviewing criminal history records of an applicant, must be transparent and forthcoming; inform the applicant at the outset about the criminal history-related information obtained; and then offer the Appellant the opportunity to address the information. That simply did not occur here.

The Department's investigator, however, was on firm ground contacting and interviewing Ms. A, who had alleged that the Appellant had engaged in domestic violence. The written summary of the conversation, prepared by Ms. M., indicates that the Appellant " … put his hands on me with the intention [redacted]. I was afraid of him and called the police." The Appellant denies this allegation and, as referenced above, Ms. A appeared remotely before the Commission

and effectively recanted statements she wrote in an a sworn affidavit and then denied that she ever confirmed the allegation of violence to Ms. M. Ms. A's testimony was entirely geared toward portraying the Appellant in a favorable light and the recanting or denial of her prior written and purported oral statements was not credible. However, some of the documentation undercutting Ms. A's testimony, was not presented by the Department until after the Appellant testified and the hearing was concluded, which I find problematic.

In summary, the Department has put forth serious allegations that, if proven, could form the basis of valid reasons to bypass the Appellant, including potential red flags about his military record, his employment history, a record of alleged domestic abuse and an alleged attempt to manipulate or circumvent the statutory residence preference given to certain qualified candidates. However, there were multiple fatal flaws in the Department's review process which resulted in the Department being unable to show, by a preponderance of the evidence, that there was reasonable justification to bypass the Appellant.

Conclusion

For all of the above reasons, the Appellant's appeal is hereby ***allowed***. Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

- HRD shall place the name of the Appellant at the top of any current or future certification for the position of permanent full-time firefighter within the Everett Fire Department until he is given one additional consideration for appointment.
- The Department shall comply with all civil service, anti-discrimination, CORI-related and other laws when conducting a subsequent review of the Appellant and other applicants.
- Nothing in this decision is meant to ensure the appointment of the Appellant as a firefighter. Rather, this order is meant to address procedural errors in this hiring cycle involving the Appellant.

- The relief provided here, placement at the top of the next certification, does not absolve the Appellant of showing that he met the residency preference in Everett at the time his name appeared on Certification No. 06530, issued on August 7, 2019.

- When the Appellant's name is placed on the top of the next certification, the Department is permitted to consider, notwithstanding the 2N+1 formula established by the Personnel Administration Rules, one additional candidate (in rank order) from that certification among those willing to accept appointment.

- Once the Appellant has been provided with the relief ordered above, the Department shall notify the Commission, with a copy to the Appellant, that said relief has been provided. After verifying that the relief has been provided, the Commission will notify HRD that the Appellant's name should no longer appear at the top of future certifications.

Civil Service Commission

/s/Christopher Bowman
Christopher Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on July 14, 2022.

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 to:
Gerald Meuse (Appellant)
Albert Mason, Esq., (or Respondent)
Michele Heffernan, Esq. (HRD)
Regina Caggiano (HRD)