

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**ANDREW MOCCIA,**  
*Appellant*

G1-15-242

v.

**BOSTON FIRE DEPARTMENT**  
*Respondent*

Appearance for Appellant:

Joseph Donnellan, Esq.  
Rogal & Donnellan, P.C.  
100 River Ridge Drive, Suite 203  
Norwood, MA 02461

Appearance for Respondent:

Robert J. Boyle Jr., Esq.  
Office of Labor Relations  
Boston City Hall, Room 624  
Boston, MA 02201

Commissioner:

Cynthia Ittleman<sup>1</sup>

**DECISION**

On, December 22, 2015, the Appellant, Andrew Moccia, acting pursuant to G.L.c. 31, §2(b), appealed to the Civil Service Commission (Commission) from the decision of the Boston Fire Department (Respondent or BFD), Appointing Authority, to bypass him for the position of firefighter. The Commission held a pre-hearing conference on January 12, 2016 and a full hearing on March 10, 2016<sup>2</sup>. The hearing was digitally recorded and the parties were provided

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Jaime Caprietta in the drafting of this decision.

<sup>2</sup> 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.

with copies of the hearing<sup>3</sup>. The witnesses, with the exception of the Appellant, were sequestered. For the reasons stated herein, the appeal is denied.

## **FINDINGS OF FACT**

Ten (10) exhibits<sup>4</sup> were entered into evidence, two of which were submitted after the hearing in response to my request at the hearing. Based on these exhibits and the testimony of the witnesses:

Called by the Respondent:

- Robert Moran, Director of Human Resources (Dir.), BFD
- Connie Wong, Deputy Commissioner of Labor Relations and Legal Affairs (Dep. Commr.), BFD

Called by the Appellant:

- Andrew Moccia, Appellant

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

1. The Appellant grew up in Lawrence, Massachusetts and is the son of a retired firefighter in another civil service community. At the time of this hearing, the Appellant was thirty (30) years old, working as a bartender in South Boston for at least three (3) years and occasionally assisting his family in its carpet cleaning business. (Testimony of Appellant; Respondent's Exh. 2)

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<sup>3</sup> If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

<sup>4</sup> The exhibits include Respondent's Exhibits 1 – 9 and Appellant's Exhibit 1.

2. On New Year's Day in 2003, when the Appellant was a senior in high school, he was charged with operating a vehicle under the influence of alcohol (OUI) in New Hampshire. The Appellant took the breathalyzer test when he was stopped by police on the road and his license was subsequently revoked for one (1) year. (Respondent's Exhs. 2 and 3; Testimony of Appellant)
3. The Appellant attended college for a while, was on the Dean's list and participated in various sports. However, the Appellant decided that college no longer suited him and, in May 2004, he enlisted in the United States Army. The Appellant was assigned to Fort Hood in Texas. In 2004, the Appellant was nineteen (19) years old when he was charged in Texas with being a minor in possession of alcohol and for public intoxication, for which he paid fines.<sup>5</sup> (Respondent's Exh. 3)
4. The Appellant subsequently attended the military firefighter academy in 2004 and became part of the Army's largest fire department located at Ft. Hood in Killeen, Texas. His Military Occupational Specialty (MOS) was firefighter, becoming a Firefighter II<sup>6</sup> and an instructor. The Appellant also received certifications in Hazardous Materials (HAZMAT), Cardio Pulmonary Resuscitation (CPR) and First Responder. (Testimony of Appellant)
5. On Labor Day in 2007, while the Appellant was home on leave from the Army, he was arrested in Haverhill for an OUI. For this OUI, the Appellant refused the breathalyzer test. The Appellant admitted to sufficient facts to support a finding of guilty (not pleading guilty), he was placed on probation in 2008 and he lost his license until

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<sup>5</sup> Although there is no document in the record indicating that the Appellant was convicted of these charges, it would appear that the Appellant took responsibility for his actions by paying the fines.

<sup>6</sup> A Firefighter II is a firefighter who creates fire intervention plans, conducts vehicle extraction, coordinates multiple emergency response teams and even combats wildfires. (Administrative Notice - [www.goarmy.com](http://www.goarmy.com))

September 2012.<sup>7</sup> Ultimately, the case was dismissed on the recommendation of the Probation Department. (Respondent's Exh.7; Testimony of Appellant)

6. The Appellant was honorably discharged from the Army in 2009. (Testimony of Appellant; Respondent's Exh. 2)
7. In October 2012, one month after the Appellant's license was reinstated, he was cited for a surchargeable accident. (Respondent's Exh. 3; Testimony of Appellant). He was nervous after not having driven for an extended period. (Testimony of Appellant)<sup>8</sup>
8. The Appellant took the firefighter Civil Service exam in April 2014, received a disabled veteran preference and scored a 99. (Appellant's Exh.1; Testimony of Moran, Wong and Appellant)
9. Commissioner Joseph Finn is the Appointing Authority for the Respondent. (Administrative Notice)<sup>9</sup>
10. In 2014, the Respondent requisitioned a list of candidates from the state's Human Resources Division (HRD) to hire fifty (50) firefighters. (Testimony of Moran; Administrative Notice)
11. Firefighter candidates attend an orientation session and are tested for illegal drug use. Those who pass the drug test are given a detailed application to complete. (Testimony of Moran; Respondent's Exh. 2; Administrative Notice)
12. Page 2 of the application contains the following instructions in relevant part:

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<sup>7</sup> The Court docket states that the Appellant lost his license for 45 days and that his license was revoked in 2008 (Respondent's Exh. 7). The Appellant's driver's record indicates, and the Appellant admits, that his license was revoked until 2012. (Respondent's Exh. 3; Testimony of Appellant) Ultimately, the criminal case was dismissed. (Respondent's Exh. 7)

<sup>8</sup> There is no indication in the record that the Appellant appealed the citation and that he was found responsible, or not responsible therefor.

<sup>9</sup> The Respondent does not dispute that Commissioner Finn is the Appointing Authority, not Dir. Moran. *See* Respondent's Recommended Decision.

“... 6. YOU ARE APPLYING FOR A RESPONSIBLE PUBLIC SAFETY POSITION. IT IS ESSENTIAL THAT YOU FOLLOW ALL INSTRUCTIONS SPECIFICALLY AS DIRECTED. MAKE SURE ALL DATES AND INFORMATION ARE ABSOLUTELY ACCURATE. IF YOU HAVE ANY QUESTIONS ABOUT THIS APPLICATION, PLEASE ASK THE FIRE FIGHTER SELECTION UNIT BEFORE SIGNING THE LAST PAGE OF THE APPLICATION UNDER THE PAINS AND PENALTIES OF PERJURY.”  
(Respondent’s Exh. 2)(emphasis in original)

13. The Appellant filled out the application on March 16, 2015. Page 3 of the application is entitled “Court Record” and asks:

1. “Have you ever been convicted of a felony?” The Appellant accurately responded “no”.
2. “Have you been convicted of a misdemeanor within the last 5 years other than a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace?” The Appellant accurately responded “no”.
3. “Were you convicted of a misdemeanor (other than a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace) more than 5 years ago which resulted in a jail sentence from which you were released within the last five years?” The Appellant accurately responded “no”.  
(Respondent’s Exhs. 2 and 3; Testimony of Moran, Wong and Appellant)

14. Page 8 of the application asks, in pertinent part:

“Has your license to operate a motor vehicle in this state, or any state, ever been suspended or revoked? If yes, state where and give details ... ”  
(Respondent’s Exh. 2)

The Appellant accurately responded “yes”, adding, in full,

“Massachusetts, OUI  
+  
New Hampshire”

(Respondent’s Exh. 2)

15. The Appellant attended the BFD orientation on April 16, 2015, where he was drug tested for illegal drugs. Since the Appellant was not informed that he failed the drug test, it appears that he passed the test. (Testimony of Moran and Appellant)

16. On May 13, 2015, two (2) Private Investigators retained by the Respondent conducted a home visit at the Appellant's residence. The Investigators asked the Appellant about the two (2) OUI charges referenced in his application. (Respondent's Exh. 3; Testimony of Wong and Appellant)

17. The Private Investigators also interviewed personal references the Appellant supplied.

The Private Investigators made observations and noted comments from the references as follows:

Neighbor: "It is a tight knit neighborhood so she does know him, he is a great addition, watches out for everyone. He cleaned up the property when he moved in. She is a police officer and trusts him with her house key to let her dog out & check on her place when she's away, wouldn't do that [with] just anyone. Knows this has been his dream & thinks he would be great at it."

Retired Boston Firefighter of 27 years: "He has known [Appellant] for about 5 or 6 years. ... He strongly endorsed [Appellant] & thinks he will be a great asset to the Department."

Past Employer: "Will be an outstanding candidate for the Department. ... has known [Appellant] for approximately 5 years. He called [Appellant] an unbelievable team player & second to none. He said [Appellant] leads by example & has all the qualities that he believes will make him a great Firefighter."

Deputy Fire Chief of the Ft. Hood Fire Department: "... [Deputy Fire Chief] does not offer [Appellant's] name lightly as a reference. It says a lot about [Appellant] as a candidate that [the Deputy Fire Chief] is providing a reference for him. He speaks very highly of [Appellant]. [Appellant] served as a full-service Firefighter from minor to major calls & would've handled heavy duty apparatus at times.

(Respondent's Exh. 3)

18. The Private Investigators reported to the Respondent that both of the Appellant's OUIs

have been "cleared" and his driving record has been clear since October 2012. The

Investigators' report indicates that, "Investigators met with [Appellant] at the condo he

owns... You will find a copy of his City of Boston Tax Statement. [The Appellant] is

currently a bartender ... & he has a personality that is large & befitting a bartender. [The

Appellant] is tall in stature & strong handed based on the grip of his handshake. He has a good personality & work ethic. Other than his military career, most of his jobs were in the food & (sic) beverage industry. He has had 2 [OUI] issues, one out of state in NH & the other in MA. Both [OUI]s have been cleared & his driving history has been clean since 10/2012.” (Respondent’s Exh.3; Testimony of Moran, Wong and Appellant)

19. After the Private Investigators met with the Appellant, they conducted a thirty (30)-minute debriefing session per candidate with Dir. Moran, Dep. Commr. Wong, and Deputy Chief (Dep. Chief) Malone at the BFD. The debriefing involving the Appellant took place on or about May 19, 2015. During the debriefing, the Investigators discussed their findings of the Appellant’s background, including the two (2) OUIs and the minor in possession of alcohol and public intoxication charges. At this point, candidates can be removed from the hiring process if warranted but the Appellant was not. (Respondent’s Exhs. 3 and 5; Testimony of Moran and Wong)
20. On May 23, 2015, the Appellant received an email message asking him to report to BFD for an interview on May 28, 2015. The Appellant was interviewed by a panel of three people: Dep. Commr. Wong, Dir. Moran, and Dep. Chief Malone<sup>10</sup>. (Appellant’s Exh. 1; Testimony of Moran, Wong and Appellant)
21. During the interview, the Appellant acknowledged and recounted the events which took place leading up to the two OUI’s, including the suspension of his driver’s license, as well as the charges against him in Texas for being a minor in possession of alcohol and

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<sup>10</sup> The Appellant recalls Deputy Chief Weylan being present at his interview. Dep. Commr. Wong was unsure whether he was present for Appellant’s particular interview. Since the Appellant was fairly certain that Deputy Chief Weylan was present at his interview, and interview notes for Deputy Chief Weylan were provided here, I find that Deputy Chief Weylan was present for the Appellant’s interview.

for public intoxication. (Respondent's Exhs. 4, 5 and 8, 9; Testimony of Moran, Wong and Appellant)

22. The interviewers are given a form provided by Dir. Moran, consisting of six (6) questions in an effort to set the framework for the interview<sup>11</sup>. This form ensures that the interviewers ask each candidate the following questions:

1. "Why do you want to become a firefighter?"
2. "Tell us some history that you know regarding the BFD."
3. "Tell me about a work emergency or crisis of some kind in which you were involved. What was your role? What did you do?"
4. "Tell me a time when you set specific work goals for yourself. How did things turn out?"
5. "What technical skills or other qualities do you bring to the position?"
6. "How can you convince us that you will not be sent back to the Personnel Department because the trainers from the FA said you are not acceptable?"

After each question on the form, there were lines on which the interviewer could indicate the candidate's responses to the questions and/or their observations in that regard and space to score the candidate's responses (from 1 to 5, with 5 being the highest score).

(Respondent's Exhs. 4 and 6; Testimony of Moran)<sup>12</sup>

23. After the interview was completed, the interviewers told the Appellant to wait outside while the interviewers deliberated. Dep. Commr. Wong expressed her concern about hiring the Appellant in view of his two (2) OUIs but Dir. Moran and Dep. Chief Malone

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<sup>11</sup> Deputy Chief Weylan did not fill out one of these forms but did take independent notes during the interview. (Respondent's Exh. 8)

<sup>12</sup> There were six (6) questions on the interviewers' scoring sheets but two (2) of the questions were marked #4 so that the last question is incorrectly marked #5.



avored giving the Appellant a conditional offer of employment. (Testimony of Moran and Wong)<sup>13</sup>

24. A few minutes after the interviewers deliberated, the Appellant was given a conditional offer of employment letter but it was signed by Dir. Moran, not Commissioner Finn.

This letter stated, in part,

“... I am pleased to extend to you a Conditional Offer of Employment for the position of Boston Fire Fighter. If you pass the medical examination and the psychological screening component of the medical examination, and if there are sufficient vacancies, we will be pleased to have you join the Boston Fire Department. ...

Please be aware, that this is **not** a final offer of employment. A final offer of employment will be offered to you if you successfully complete the medical/psychological processing **and** your name is high enough on the civil service certification to be selected.

... The Boston Fire Department reserves the right to rescind this conditional offer of employment should information become available that your appointment as a Boston Fire Fighter would not be in the public interest. ...”

(Appellant’s Exh.1; Testimony of Moran, Wong and Appellant)(**emphasis in original**)(emphasis added)

25. Candidate B also received a conditional offer of employment letter signed by Dir. Moran shortly after he was interviewed. Like the Appellant, Candidate B has more than one (1) OUI on his record.<sup>14</sup> (Testimony of Moran and Wong)

26. At the time that the conditional offer of employment letters signed by Dir. Moran were given to the Appellant and candidate B, Commissioner Finn was unaware that such letters had been issued. (Testimony of Moran and Wong)

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<sup>13</sup> Dir. Moran testified that it was the Respondent’s practice to prepare conditional offers of employment in advance of its interviews and to give the letters to candidates on the day of their interviews. Dep. Commr. Wong indicated that, based on its experience in the hiring cycle at issue here, the Respondent no longer gives candidates conditional offer letters on the same day as their interviews.

<sup>14</sup> There is no indication in the record of the dates of candidate B’s OUIs.

27. After the Appellant was given the conditional offer of employment letter signed by Dir. Moran, Dep. Commr. Wong conversed with Commissioner Finn to inquire about his policy regarding candidates with two (2) OUIs on their record. Dep. Commr. Wong understood that the previous Commissioner had a five-year “look back policy”, meaning that if a candidate had one (1) OUI on his or her record within the previous five (5) years, he or she would be disqualified automatically. However, Commissioner Finn’s directive was that he would not adhere to a bright-line five (5)-year period, indicating that if a candidate has one (1) OUI, Commissioner Finn wanted to know the underlying facts of the OUI and when it occurred, as well as the candidate’s entire background in order to assess each candidate separately. (Testimony of Wong)
28. Although Dir. Moran had worked with now-Commissioner Joseph Finn for several years when he (Commissioner Finn) was Deputy Chief of Personnel, Commissioner Finn had not informed Dir. Moran what he looked for in a candidate nor his position on candidates with OUI arrests or convictions in their background. (Testimony of Moran)
29. Shortly after Dep. Commr. Wong met with Commissioner Finn, Dir. Moran reviewed with Commissioner Joseph Finn the information the Respondent had obtained about candidates who had been given conditional offers of employment signed by Dir. Moran. Commissioner Finn articulated two (2) major concerns to Dir. Moran: 1) accident reports in a candidate’s record are unfavorable because good driving should be a priority in hiring, and 2) any candidate who has two (2) OUIs would not be accepted regardless of when they occurred<sup>15</sup>. (Testimony of Moran)

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<sup>15</sup> Commissioner Finn told Dep. Commr. Wong that one (1) OUI would not be accepted, but later told Dir. Moran that two (2) OUIs would not be accepted.

30. Following the review of the records of candidates who had received conditional offer of employment letters, Commissioner Finn told Dir. Moran to withdraw the conditional offer letter given to the Appellant because of his OUIs. (Testimony of Moran)

31. On June 24, 2015, Dir. Moran met with both the Appellant and candidate B separately and told them that the BFD had rescinded the conditional offer of employment letters that they had been issued. (Testimony of Moran and Appellant)

32. By letter dated October 23, 2015, Commissioner Finn wrote to the Appellant, in part, Stating, in part:

“... You have applied for an important public safety position and it is necessary that applicant’s background history is investigated as to the legitimacy for employment as a Boston Fire Fighter. As part of the consideration process all [c]andidates must answer any questions truthfully, accurately[,] completely on the application questionnaire and a failure to do so shall and can result in the candidate disqualification. You are also required to submit the documents requested of you. A routine background investigation has revealed the following:

[list of entries on the Appellant’s driver’s record]...

On Thursday, May 28, 2015, you reported to the Human Resources Office to go over your application questionnaire and the information obtained from your background investigation. Mr. Moccia[,] you will not be selected for appointment to the Boston Fire Department. Your background investigation has revealed that you have a very poor driving record, including a surchargeable accident. Your record shows two (2) [OUI] offenses in New Hampshire in 2003 and in Massachusetts in 2007<sup>16</sup>. Your driver’s license was suspended on both occasions. For the Massachusetts infraction, you continued your case without a finding and placed on a period of probation. You also stated that as a result of your refusal to submit to a breathalyzer in both instances<sup>17</sup>, your driver’s license in the Commonwealth was suspended for a period of five years. In addition, you indicated that you were arrested in 2008<sup>18</sup> for public intoxication. In totality, your actions in these circumstances display a lack of judgment and respect for the law, and display character traits that do not comport with the expectations of public safety personnel.

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<sup>16</sup> The record shows that there was one (1) OUI in NH and one (1) in MA.

<sup>17</sup> The record indicates that the Appellant refused the breathalyzer in 2007 but not in 2003.

<sup>18</sup> The record shows that the Appellant was charged with public intoxication and as a minor in possession of alcohol while stationed in Texas in 2004, not 2008.

It is not in the City's best interest that you are selected for the position of a Boston Fire Fighter. Your actions conflicts (sic) with the intents and goals of a public safety department and lowers the trust and feeling of safety that the community places in the City. A Fire Fighter's (sic) duties and responsibilities are many and varied. Among these are that a Fire Fighter must be honest, trustworthy and dependable. These personal qualities are crucial to a public safety position and cannot be compromised. A Fire Fighter's responsibilities require that in addition to their suppression duties, they uphold the Fire Prevention and Arson Laws, they may cite persons and initiate court actions based on the Fire Code and Criminal Violations related to fire and public safety. Mt. Moccia you have demonstrated by your record that you have disregard for the law, therefore, it is my opinion that you would be unable to conform to the Rules and Regulations of the Boston Fire Department.

You have a right to appeal this decision to bypass you to the Civil Service Commission ...  
(Respondent's Exh. 1)

33. The Appellant was tied in the ninth position on certification #02712. (Stipulation; Administrative Notice)
34. Of the fifty (50) candidates the Respondent hired from certification #02712, approximately half of them ranked below the Appellant. (Stipulation)
35. The Appellant filed the instant appeal on December 22, 2015. (Administrative Notice)

Applicable Law

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997). The Appointing Authority is any person, board or commission with power to appoint or employ personnel in civil service positions. G.L. c. 31 §1. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common

sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 188 (2010)(appointing authority is to conduct reasonably thorough review of allegations of misconduct by a police candidate, finding a credible basis for the allegations, rather than proving that the candidate had in fact engaged in the misconduct). The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). The Commission is guided by the “principle of uniformity and the equitable treatment of similarly situated individuals [both within and across appointing authorities]” as well as the “underlying purpose of the civil service system to ‘guard against political considerations, favoritism and bias in governmental employment decisions.’” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont,

388 Mass. 632, 635 (1983); Comm'r of Health & Hosps. of Bos. v. Civil Serv. Comm'n, 23 Mass.App.Ct. 410, 413 (1987)).

Parties' Arguments

The Appellant argues that his years of experience in the Army as a firefighter, his employment record since then and the strong recommendations from a police officer neighbor, Deputy in the Ft. Hood Fire Department, and a prior employer make him well qualified to be a firefighter at the BFD. He argues further that the Respondent issued a conditional offer of employment to him after he disclosed the two (2) OUIs and two (2) charges in Texas that occurred years ago and that, therefore, there was nothing discovered after he received the conditional offer that justifies withdrawal of the offer of employment. In addition, he asserts, he did not take and fail the medical and psychologist examinations after receiving the condition offer of employment, which would invalidated the conditional offer. Also, the Appellant argues that the Respondent changed its hiring standards after it extended the conditional offer of employment to him. Specifically, the previous Fire Commissioner determined that candidates who had one (1) OUI within the five (5)-year period prior to their application for employment would not be hired. Since the Appellant's most recent OUI was more than five (5) years old, he asserts, he would not have been disqualified from consideration. To make this change in the hiring process mid-stream, the Appellant avers, is arbitrary, prejudicial, unfair and violates basic merit principles. Therefore, the Appellant avers, *inter alia*, the conditional offer should be reinstated, eligible list #02712 should be revived, and that the Respondent should process the Appellant's application promptly.<sup>19</sup>

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<sup>19</sup> Prior to the Commission hearing, the Appellant argued that there was another candidate who also had more than one OUI who was being considered by the Respondent. However, at the Commission hearing Dep. Commr. Wong and Dir. Moran both testified, and I find above, that candidate B, who had also received a conditional offer of employment letter, had more than one (1) OUI and his conditional offer letter was also withdrawn.

The Respondent argues that its denial of the Appellant's application was strongly supported by the Appellant's poor driving record and three (3) alcohol-related arrests: two (2) OUIs and for public intoxication, which the Appellant admitted in his application to the BFD, at his BFD interview and at the Commission hearing. Further, the Respondent asserts, its decision was supported by the facts that the Appellant refused to take the breathalyzer test in the 2007 OUI, he admitted to a finding of sufficient facts in the 2007 OUI, and he had a surchargeable accident shortly after he regained his license in 2012. The Respondent states that, as noted in Commissioner Finn's letter, the Appellant's record shows a lack of judgement and respect for the law. Employing a candidate with such a record, the Respondent avers, can affect the Department's safe operation, liability and reputation. Moreover, the Respondent asserts, the only change in its policy that has occurred with regard to candidates with an OUI in their records is that they would be considered on a case-by-case basis and the Appellant had two (2) OUIs and lengthy license revocations, in addition to other incidents, which provide the Respondent with reasonable justification for its actions. In addition, the Respondent argues that the conditional offer letter signed by Dir. Moran did not preclude the Commissioner Finn from determining that the Appellant should not be hired. Finally, the Respondent argues that being a firefighter is physically and mentally demanding and involves a thirty (30) year commitment, implying that the Appellant would be at greater risk of abusing alcohol under such stress. Therefore, it avers, it is well within its authority to decline to hire candidates with records involving multiple alcohol-related criminal charges.

### Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. There is no dispute that the Appellant's record

includes two (2) OUIs, a charge of public intoxication and a charge for being a minor in possession of alcohol. A poor driving record alone is a sufficient basis for bypass. Franklin v. Leominster, 23 MCSR 808, 810 (2010); Driscoll v. Boston Police Department, 20 MCSR 477 (2007). The Appellant's first OUI occurred in New Hampshire in 2003. The Appellant took the breathalyzer test and his license was suspended for one (1) year. In 2004, approximately one (1) year after his first OUI, the Appellant was stationed in Texas and was charged with public intoxication and being a minor in possession of alcohol, for which he paid related fines. In 2007, three (3) years after the Texas alcohol-related charges, the Appellant was charged with a second OUI while he was home on leave from the Army. This time, the Appellant refused the breathalyzer test, admitted to sufficient facts to establish the OUI and his license was suspended until September 2012. Although not alcohol-related, the Appellant was involved in a surchargeable car accident approximately one (1) month after his license was reinstated following the second OUI. Thus, the Respondent has established that the Appellant's record contained multiple incidents related to alcohol, which were unacceptable for a firefighter. Although it was roughly eight (8) years prior to the Appellant's 2015 application for employment at the BFD since the Appellant's second OUI, he had no license for at least half that time. Given that the span of time over which the Appellant was arrested for other alcohol-related matters, there was insufficient time during which the Appellant might have shown that he had no additional alcohol-related incidents. In the face of the Respondent's concerns for the safety of the public and the members of the BFD, its need for firefighters whose records indicate that they can be entrusted with driving emergency vehicles and enforce applicable laws, and the concern that the stress that firefighters face in their arduous and often dangerous jobs could be undermined by alcohol abuse, the Respondent has proved that it had reasonable justification.



The gravamen of this appeal is that the Appellant was given a conditional offer of employment after he disclosed his record and the investigators and interviewers discussed it with him and the Respondent improperly withdrew the offer after it changed its standards with respect to candidates' OUI records. The offer letter was signed by Dir. Moran. However, Commissioner Finn is the appointing authority for the Respondent. Going forward, the Respondent should ensure that the appointing authority signs conditional offers. Absent the appointing authority's signature, the offer was invalid<sup>20</sup>. The Appellant was not singled out for his record, nor was he the subject of bias, political control or objectives unrelated to merit standards. As established here, the Respondent withdrew its offer not only to the Appellant but also to candidate B, who also had more than one (1) OUI in his record. To the extent that the Respondent modified the standard for candidates with one (1) or more OUIs in their records, it was within the Respondent's discretion to find that candidates with more than one (1) OUI would not be hired.

### Conclusion

Accordingly, for the foregoing reasons, the appeal of Mr. Moccia, under Docket No. G1-15-242, is hereby *denied*.

Civil Service Commission  
/s/ Cynthia Ittleman

Cynthia Ittleman  
Commissioner

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)(1), 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

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<sup>20</sup> This is not to question whether those who were hired after receiving the conditional offers in 2015 are valid since they were required to meet the conditions of passing the medical and psychological examinations. At the pre-hearing conference, the Respondent acknowledged that the issuance of the conditional offer to the Appellant in the circumstances here was an error.

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:

Joseph G. Donnellan, Esq. (for Appellant)

Robert J. Boyle, Jr., Esq. (for Respondent)

Patrick Butler, Esq. (for HRD)

John Marra, Esq. (HRD)