

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DAVID O'BRIEN,
Appellant,

CASE NO: G1-11-91

v.

CITY OF FALL RIVER,
Respondent

Appearance for Appellant:

John M. Becker, Esq.
Sandulli Grace PC
44 School Street – Suite 1100
Boston, MA 02108

Appearance for Respondent:

Christy M. DiOrio, Esq.
Office of the Corporation Counsel
City of Fall River
One Government Center
Fall River, MA 02722

Commissioner:

Paul M. Stein

DECISION

The Appellant, David O'Brien, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), claiming that he was denied appointment as a Firefighter with the City of Fall River Fire Department (FRFD) because the Massachusetts Human Resources Division (HRD) wrongfully reported to the FRFD that he had failed the Physical Abilities Test (PAT) administered by HRD. By Decision dated February 9, 2012, 25 MCSR 53, the Commission determined that, as to HRD, Mr. O'Brien's appeal was untimely, but that he had made a timely appeal against FRFD. On February 13, 2012 the Commission received a Joint Motion for Relief Under Chapter 310 of the Acts of 1993, which was denied. An evidentiary hearing on the appeal against

FRFD was held on August 24, 2012, which was digitally recorded. FRFD called three witnesses and the Appellant testified on his own behalf. Witnesses were not sequestered. The Commission received nine (9) exhibits in evidence and, on January 22, 2013 took a view of the premises where the Appellant's PAT had been conducted. The Commission received the parties' post-hearing submissions on May 1, 2013.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted in evidence, the Stipulations of the parties, the testimony of the witnesses (the Appellant, FRFD District Chief William Pappas, FRFD Captain Kenneth Lima and former FRFD Fire Chief Paul Ford), the view of the Hudson Armory, and the inferences reasonably drawn from the evidence, I make the findings of fact set forth below.

1. The Appellant, David W. O'Brien, resides in the City of Fall River. His name (among others) appeared at the top of a July 2010 certification issued by HRD from which the FRFD would select candidates for appointment as permanent firefighters. (*Claim of Appeal; Exhs. 5 & 7; Testimony of Appellant & Chief Ford*)

2. The Appellant was a part of a group of candidates for appointment as full-time permanent firefighters who were ordered to be placed at the top of the eligible list by special act of the legislature in 2008, after the Commission rejected their appeals to revive a 2004 list on which they had appeared but which had expired before they were reached for consideration.. (*Testimony of Appellant & Chief Ford*) See Acts of 2008, c.324; Burke, et al. v. Human Resources Division et al, 21 MCSR 177 (2008).

3. As a result, Mr. O'Brien was at the top of the July 2010 certification issued to the FRFD for the appointment of up to 48 new firefighters. (*Testimony of Chief Ford*)

4. On or about August 13, 2010, the FRFD issued a written conditional offer of employment to Mr. O'Brien, which was contingent upon the successful completion of the Firefighter's Physical Abilities Test (PAT), among other things. The offer letter stated: "Failure to present yourself for or to successfully pass any of the . . . requirements will disqualify you for the position [of firefighter]." (*Stipulated Facts; Exh.1*)

5. The Firefighter's PAT consists of seven events, six of which are timed and must be completed within a prescribed limit or "cut score", and one of which requires completion of a specified number of repetitions within a set time. A candidate must successfully complete each event before moving to the next event. A passing score in all seven events is required to pass the PAT. (*Exh. 2; Testimony of Capt. Lima; Prior Administrative Notice [HRD Video of Firefighter's PAT, www.mass.gov]*)

6. The third event in the PAT sequence is called the Hose Advance. This event requires a candidate to pull a fully "charged" fire hose through a maze and then across the finish line within a "cut score" of 20 seconds or less. (*Stipulated Fact; Exhs. 2 & 3; Testimony of Capt. Lima; Prior Administrative Notice [HRD Video of Firefighter's PAT, www.mass.gov]*)

7. Prior to the PAT, Mr. O'Brien and other candidates attended a practice session at the Hudson Armory where the PAT would be administered. They quickly discovered what others familiar with the PAT knew, namely that the Hose Advance event was the most difficult of the seven events. Of the four practice attempts Mr. O'Brien made on the Hose Advance apparatus, he successfully completed the event only once within the allotted time. (*Testimony of Appellant, Chief Ford & Capt. Lima*)

8. On September 21, 2010, Mr. O'Brien appeared at the Hudson Armory test site to take the PAT. (*Exh. 2; Testimony of Appellant*)

9. District Chief Pappas and Capt. Lima attended the PAT on September 21, 2010 to observe the FRFD candidates and brought materials to be provided to the successful candidates. They were stationed in a balcony above the armory floor. Their vantage point was in direct view of the start/finish line of the Hose Advance event. (*Testimony of Dist. Chief Pappas & Capt. Lima*)

10. Mr. O'Brien completed the first two events within the required time. He failed the "Hose Advance" with a recorded time of 28.06 seconds, which was 8.06 seconds over the required 20 seconds "cut score". He failed to make the allotted time, in part, because he tripped and fell during the event. (*Stipulated Facts; Testimony of Appellant*)

11. Because he failed the Hose Advance event, Mr. O'Brien was disqualified and was not allowed to continue to attempt the remaining four events. (*Stipulated Facts*)

12. Knowing that the Hose Advance was the toughest part of the PAT, Capt. Lima unofficially timed the FRFD candidates on that event, using a stopwatch on his cell phone. He timed Mr. O'Brien's Hose Event at approximately 28 seconds. (*Testimony of Capt. Lima*)

13. A candidate for original appointment as a firefighter may request one re-test of the PAT. If a candidate fails the PAT on his or her second try, the conditional offer of employment "shall be rescinded." (*Stipulated Facts; Administrative Notice [G.L.c.31, §61A, ¶3]*)

14. Mr. O'Brien requested a re-test and appeared for his second PAT on September 23, 2010. The two HRD test monitors who followed him during his September 23, 2010

retest were the same two monitors who had followed him on September 21, 2010. (*Exhs. 2 & 3; Testimony of Appellant*)

15. Dist. Chief Pappas and Capt. Lima also attended the September 23, 2010 PAT retest of Mr. O'Brien and two other FRFD candidates who also had failed the September 21, 2010 PAT. (*Exh. 9; Testimony of Dist. Chief Pappas & Capt. Lima*)

16. The Hudson Armory was set up the same way as the initial PAT. Dist. Chief Pappas and Capt. Lima observed the test from the same vantage point on the balcony above the floor directly in front of the start/finish line of the Hose Advance event. (*Testimony of Dist. Chief Pappas & Capt. Lima*)

17. Mr. O'Brien again successfully completed the first two PAT events and proceeded to the Hose Advance. (*Exh. 3; Testimony of Appellant*)

18. Mr. O'Brien had some trouble pulling the hose through the Hose Advance maze, the hose became momentarily caught at one point, he hit his head on the ceiling and his feet slipped a little. He did reach the finish line without tripping. As he crossed the finish line, the proctor timing him said "Good". (*Testimony of Appellant, Dist. Chief Pappas & Capt. Lima*)

19. Mr. O'Brien's PAT score sheet for the September 23, 2010 PAT, states, for the Hose Advance:

"HOSE ADVANCE
COMPLETED EVENT: YES NO IF NO, WHY _____
TOTAL TIME 27:72 (CUT SCORE 20.00 secs) **PASS** FAIL (circle one)"

(*Exh. 3*)

20. Capt. Lima had unofficially timed Mr. O'Brien with the stopwatch on his cell phone. He noted the time, again, was 28 seconds. (*Testimony of Capt. Lima*)

21. Mr. O'Brien thought the proctor's statement "Good" meant that he had passed the Hose Advance event and believed he was being taken across the floor to the next event. He exchanged a "thumbs up" with a friend, Patrick Burke, who was looking into the armory through a small outside window. (*Testimony of Appellant; Commission View*)

22. As Mr. O'Brien was giving his "thumbs up" to Mr. Burke, the proctor who had told Mr. O'Brien "Good" walked away from Mr. O'Brien toward a second proctor who was positioned in the middle of the floor near the Hose Advance maze. The second proctor called Mr. O'Brien over and informed him that he had failed the Hose Advance. Mr. O'Brien disputed this by stating that the other proctor had said "Good" when he completed the event. (*Testimony of Appellant, Dist. Chief Pappas & Capt. Lima; Commission View*)

23. Mr. O'Brien recalled that he was given a document after he failed the second PAT that advised him of his appeal rights, but neither party could produce the original or a copy of that document. The HRD test sheet for Mr. O'Brien's September 23, 2010 test shows that Mr. O'Brien acknowledged that he had been informed that he had completed the Hose Advance event but failed because he "went overtime". (*Exh.3; Testimony of Appellant*)

24. Within a day or two after being told he had failed the September 23, 2010 PAT re-test, Mr. O'Brien visited Chief Ford at the FRFD. He told Chief Ford that he believed he had, indeed, passed the Hose Advance because he heard the proctor say "Good". Chief Ford said that HRD administered the PAT and that the FRFD had no jurisdiction over the PAT. Since HRD said he had failed, Chief Ford said that disqualified him from appointment as a FRFD firefighter. (*Exh. 8: Testimony of Chief Ford*)

25. During that meeting with Mr. O'Brien, Chief Ford told him that, just because the proctor said "Good", it did not necessarily mean he passed the event, but only that Mr. O'Brien had completed the event, but not necessarily within the allotted time. At the hearing before the Commission, Mr. O'Brien acknowledged that Chief Ford's interpretation was not unreasonable. (*Exh. 8; Testimony of Appellant & Chief Ford*)

26. On or about January 21, 2011, FRFD Chief Ford sent Mr. O'Brien a letter which stated that he "did not successfully complete the physical abilities test administered through civil service and, therefore [was] disqualified from the hiring process." The letter stated that Mr. O'Brien had the "right to appeal this determination by filing your appeal, in writing, within sixty calendar days of receipt of this notice, with the Civil Service Commission. . . ." (*Stipulated Facts; Exh. 4; Testimony of Chief Ford*)

27. On March 18, 2011, Mr. O'Brien duly filed the present appeal. (*Claim of Appeal ; Exh. 5*)

CONCLUSION

Applicable Standard of Review

Appeals from a bypass for original appointment to a permanent civil service position. are governed by G.L.c.31, Section 27, which provides:

"If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest."

The task of the Commission when hearing a bypass appeal is "to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the decision to bypass the

candidate Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same)

The Commission’s primary concern is to ensure that the appointing authority’s action comports with “basic merit principles,” as defined in G.L.c.31,§1. 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). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.”)

The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass

256, 264-65 (2001) It is the purview of the hearing officer to determine the credibility of the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (decision relying on an assessment of the relative credibility of witnesses cannot be made by someone who was not present at the hearing)

Analysis

All candidates for original appointment to a civil service position of firefighter must take and pass a physical abilities test, designed and administered by HRD that demonstrates the candidate’s ability to handle the routine and essential physical requirements of the job of a firefighter. See G.L.c.31 §61A, ¶¶1 & 3. A candidate is entitled to two, and only two, fair and valid chances to pass the test. If a candidate “fails to pass the reexamination, his appointment shall be rescinded” by the appointing authority. Id., at ¶3. See generally, Commonwealth of Massachusetts Human Resources Division, “Massachusetts Fire Departments Physical Abilities Test Preparation Guide.”

Here, the Appellant concedes that HRD told him he had failed the Hose Advance event during his PAT reexamination on September 23, 2010 and denied him the right to continue to complete the test. The PAT test documentation provided by HRD which appears to have been prepared and maintained by HRD in the ordinary course of business, clearly and unequivocally reports that Mr. O’Brien failed the Hose Advance

event on September 23, 2013. The preponderance of the evidence supports the FRFD's position that it reasonably relied on this documented failure to pass the required PAT and, therefore, its decision to bypass Mr. O'Brien was reasonably justified.

First, I find no reason to draw any inference that Mr. O'Brien had completed the Hose Advance event within the allotted 20 seconds from the statement by one of the HRD proctors who said "Good" when Mr. O'Brien pulled the hose over the finish line. That statement is at least as likely, if not more likely, to infer merely that the event had been completed, without reference to the time elapsed. It would be reasonable to infer that the proctor was observing Mr. O'Brien as he reached the finish line, not the stopwatch, for, if it were the other way around, the proctor would not know when to push the button to stop the timer. More significantly, even Mr. O'Brien agrees that such an interpretation is a plausible one, and that is how Chief Ford and the other FRFD officers interpreted the statement.

Second, although Mr. O'Brien suggests that there is other evidence to warrant a different interpretation, that evidence is not persuasive. The alleged coincidence that his time on the September 21st Hose Advance test and the September 23rd test were almost identical is not so improbable that it discredits the results. Mr. O'Brien had difficulties during both tests and can offer only speculation that his mishaps on the second test cost him materially less time than his tripping on the first test. Similarly, I do not credit Mr. O'Brien's statement that the proctor was leading him to the next event as credible evidence that Mr. O'Brien must have passed the Hose Event. Based on my observation of the PAT floor arrangements, a proctor would need to take essentially the same path to the center of the floor whether he was going to meet the head proctor or was leading a

candidate to the next event after the Hose Advance. Thus, what Mr. O'Brien thought the proctor was doing was not what he was actually doing, namely, approaching the head proctor in the center of the floor. This conclusion is corroborated by the testimony of Capt. Lima and Dist. Chief Pappas.¹

Third, Mr. O'Brien takes issues with the clear and convincing corroborating evidence from Dist. Chief Pappas and Capt. Lima that supports the conclusions reported by HRD that Mr. O'Brien had twice failed the PAT. Essentially, Mr. O'Brien argues that what these FRFD officers said they saw was what usually happened during other PAT tests that they had observed, and that the officers were conflating (either knowingly or inadvertently) their memory of different events with what they actually saw during Mr. O'Brien's PAT tests. I find, however, that it is Mr. O'Brien's perception of the events that is faulty. The level of disappointment he experienced must surely have been intense, knowing that this was, perhaps his last chance to become a FRFD firefighter, as his eligibility for appointment under the special act of the legislature only entitled him to one further consideration in the 2010 hiring cycle. The fact remains that the preponderance of the evidence does not support his version of what occurred on September 23, 2010.

Finally, Mr. O'Brien suggests that there was some ulterior motive behind HRD's decision to falsely claim that he had failed the PAT so that he would be denied appointment to the FRFD. He claims that this motivation stemmed from the fact that HRD and/or FRFD resented him because he had contested his non-selection in 2004 and

¹ Mr. O'Brien asserted that the "thumbs up" he got from Mr. Burke supports his claim that Mr. Burke, also, thought Mr. O'Brien had passed the Hose Advance event. Mr. Burke did not appear at the Commission hearing and a request to continue the hearing to a second day to accommodate his appearance was denied as his absence was neither sufficiently excused nor was the evidence he would be expected to give clearly explained as material. After taking the view of the armory, I am firmly convinced that Mr. Burke's vantage point through a small window in the middle of the armory did not afford him a sufficient perspective for him to provide any probative evidence as a percipient witness of the disputed versions of the proctor's movements.

obtained special legislative relief entitling him to one more consideration. Bias of any kind cannot be tolerated in civil service hiring decisions, but I find no probative evidence of such bias here. The special legislation named a group of individuals and there is no evidence that anyone other than Mr. O'Brien who was required to be considered by virtue of that legislation was similarly prejudiced. I find no direct or indirect evidence that Chief Ford or anyone else at FRFD harbored any bias against Mr. O'Brien and nothing to warrant even speculation that FRFD and HRD somehow conspired together to that end.

Accordingly, for the reasons stated above, the appeal of the Appellant, David O'Brien, is hereby *dismissed*.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on October 31, 2013.

A True Record. Attest:

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)(l), the motion must identify a clerical or mechanical error in the 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 a Civil Service Commission's final decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

John M. Becker, Esq. (for Appellant)

Christy Diorio, Esq. (for Respondent)

John Marra, Esq. (HRD)