

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

SEAN P. O'BRIEN,
Appellant

v.

G1-11-56

CITY OF SOMERVILLE,
Respondent

Appellant's Representative:

Andrew Puglia
158 Powderhouse Blvd.
Somerville, MA 02144

Respondent's Attorney:

Matthew J. Buckley
Assistant City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Commissioner:

Christopher C. Bowman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant Sean O'Brien (O'Brien or Appellant), appealed the decision of the City of Somerville (City or Appointing Authority) to bypass him for original appointment to the position of reserve firefighter. The Appellant filed a timely appeal with the Civil Service Commission (Commission) on February 17, 2011. A pre-hearing was held on March 15, 2011. A full hearing was held on January 30, 2012 after multiple requests for continuances. The hearing was digitally recorded.

¹ The Commission acknowledges the assistance of Law Clerk Mary B. Flaherty in preparing this decision.

FINDINGS OF FACT:

Six (6) exhibits were entered into evidence by the Appointing Authority at the hearing. Seven (7) exhibits were entered into evidence by the Appellant at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Sgt. Sean Sheehan, Patrol Supervisor Sargent, Somerville Police Department;
- Robert V. Collins, Jr., Chief Labor Counsel for the City of Somerville;
- Kevin Kelleher, Fire Chief, Chief Engineer, City of Somerville;

For the Appellant:

- Kelly Balistrer

I make the following findings of fact:

1. The Appellant is a thirty-six (36) year old male. He currently resides in Somerville with his wife and three children. (Exhibit 2; Exhibit 4)
2. The Appellant is a disabled combat veteran of the U.S. Marine Corps, who served on active duty from 2005-2009, including two tours of duty in Iraq. He was honorably discharged in July 2009, holding the rank of corporal. (Exhibit 2; Exhibit 4; Exhibit 7)
3. Prior to his service in the Marine Corps, the Appellant maintained his principal residence in Somerville. When the Appellant returned from his service in Iraq, he relocated with his wife and children to 41 Kilby Street in Woburn on September 1, 2009 and occupied that residence for a period of eight months until July 4, 2009, at which time he took up residence at 141 North Street, Somerville. (Exhibit 4; Testimony of Sheehan)
4. The Appellant took and passed the makeup exam for the position of firefighter that he was entitled to take as a returning veteran on September 11, 2009. (Exhibit 4)

5. Ordinarily, in order to be eligible for a residency preference in Somerville for the 2009 firefighter exam, he would have had to be a resident of Somerville during the one year period preceding the civil service examination. (G.L. c. 31, Section 58; Exhibit 4)
6. However, a policy of the state's Human Resources Division (HRD) provides that military personnel who were on full-time active duty during any part of the 12-month period may still be eligible to claim residency preference even if they didn't reside in that city or town during the 12-month window. Individuals who meet this requirement may claim residency in the city or town where they resided before or after their active military duty.
7. It is undisputed that the Appellant lived in Somerville prior to his active military duty. As referenced in the findings that follow, he then resided in Woburn upon the expiration of his active military duty. Thus, even though he was residing in Woburn, the Appellant was eligible to claim a residency preference in Somerville or Woburn. Based on the testimony, documentary evidence and inferences that I have drawn, in part, from the Appellant's failure to testify, I find that the Appellant was unaware of this active military duty exception at the time he began his application process for reserve firefighter in Somerville.
8. On September 1, 2009, the Appellant listed 41 Kilby Street, Woburn on his Residency Preference Claim Form at the time he took the makeup exam. (Exhibit 4)
9. In 2010, the Appellant was under consideration for selection as a reserve firefighter in the City of Somerville. His name appeared first on Certification No. 207184. (Stipulated Fact; Exhibit 1)
10. While filling out his application for employment with the City of Somerville, however, the Appellant listed an address of 158 Powderhouse Boulevard in Somerville and failed to list

the 41 Kilby Street address in Woburn. The Appellant was required to list all of his past addresses and residences and failed to list the Woburn address. (Exhibit 2)

11. As part of the application process, a background investigation was conducted of the Appellant by Somerville Police Sergeant Sean Sheehan. (Testimony of Sheehan)
12. As part of the background investigation, the Appellant was required to supply credit reports. The Appellant supplied credit reports with the Woburn address at 41 Kilby Street redacted with white out. (Testimony of Sheehan)
13. As part of the background investigation, Sgt. Sheehan went to the Kilby Street address in Woburn numerous times in May 2010 and observed both the Appellant's and his wife's vehicles parked outside. Sgt. Sheehan also obtained a copy of the lease agreement, a standard one year lease for the 41 Kilby Street address in the Appellant's wife's name. (Testimony of Sheehan)
14. Sgt. Sheehan subsequently spoke to the Appellant on June 3, 2010, offering him the opportunity to correct his application with no questions asked. The Appellant took the application to make changes, adding that he was EMS certified and listed one additional Somerville firefighter that he knew. The Appellant made no changes to his address at that time. (Testimony of Sheehan)
15. Later that same day, June 3, 2010, Sgt. Sheehan called the Appellant and asked him during their phone conversation to state his address. The Appellant replied with the 158 Powderhouse Boulevard, Somerville address and also stated that he was in the process of moving to North Street in Somerville. (Testimony of Sheehan).
16. On July 2, 2010, Sgt. Sheehan again visited the 41 Kilby Street address in Woburn. The address had a mailbox with the name of O'Brien on it, and the Appellant and his wife were

inside the residence at the time. The Appellant came to the door to speak with Sgt. Sheehan. The Appellant explained that his legal address was in Somerville but that he was staying in Woburn temporarily. (Testimony of Sheehan)

17. On July 7, 2010, the Appellant wrote to Somerville Personnel Director Jessie Baker, acknowledging his Woburn residence, explaining that it was a temporary residence. (Exhibit 3)
18. The Appellant's wife maintained the 158 Powderhouse Boulevard address as her permanent mailing address on her license and registration while she occupied the 41 Kilby Street residence. The Appellant also used the 158 Powderhouse Boulevard address as his address for voter registration purposes in January, 2010. (Exhibit 4)
19. On August 12, 2010, the City of Somerville scheduled an interview for the Appellant. Upon arrival, the Appellant requested that his representative be allowed to attend the interview. The interview panel denied the request after consideration because no other candidate had ever been allowed to have representation present. The Appellant then declined to take part in the interview (Testimony of Collins)
20. The Appellant did later participate in an interview scheduled for the purpose of discussing the discrepancy regarding his home address. The Appellant stated at that time that his permanent address was the 158 Powderhouse Boulevard address in Somerville, and the 41 Kilby Street address in Woburn was only a temporary one. (Testimony of Collins; Testimony of Kelleher)
21. On November 29, 2010, Mayor Curtatone, the Appointing Authority for the City of Somerville, notified the Human Resources Division that he was bypassing the Appellant due to his untruthfulness in the application process. (Exhibit 5)

22. The Appellant opted not to testify before the Commission and I advised him that I may draw an adverse inference from this, which I have done.

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

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 at 304. 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.

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

CONCLUSION

Military personnel who were on full time-active duty during any part of the 12 month period up to the date of the Firefighter Entry Level Exam, are entitled to claim residency preference in either the city or town where they resided at the time of entry to full-time active duty, or the city or town in which they establish residency upon their return. The Appellant, a disabled veteran of

the US Marine Corps, was entitled to claim residency preference in Somerville or Woburn as he was a resident of Somerville at the time of his entry to full-time military active duty and he then resided in Woburn upon his return from active military duty. I conclude that the Appellant was unaware of this provision at the time he began the application process in Somerville. Thus, the Appellant tried to use a Somerville address where he was not residing, believing, mistakenly, that he must have a Somerville address to receive a Somerville residency preference.

The Appellant stated numerous times in conversations with Sgt. Sheehan that he was living at 158 Powderhouse Boulevard in Somerville while it was clear from the investigation that he was, in fact, living at the Woburn address. Sgt. Sheehan testified that the Appellant seemed surprised and nervous when confronted at the Woburn address, and it was not until after this encounter that the Appellant wrote to the City acknowledging the Woburn address and explaining that it was only a temporary one.

Based on the credible testimony of Sgt. Sheehan, the documentary evidence and the adverse inference I have drawn from the Appellant's failure to testify, I conclude that the Appellant was untruthful during the application process by: 1) failing to state that he was residing in Woburn; and 2) attempting to conceal this information by altering a copy of his credit report. Although the Appellant failed to testify, I considered his representative's argument that his bypass was related to a prior appeal that he filed with the Commission and two related appeals that ensued. (See Layton, Sean and Ryan v. City of Somerville, 24 MCSR 440 (2011)). I have concluded that the City, as it ultimately did in the Layton cases, did a thorough review of the Appellant to ensure that the information submitted in his application was true and accurate. Unfortunately for Mr. O'Brien, it was not. He failed to list a Woburn address where he was residing and opted not to testify before the Commission to rebut this valid reason for bypassing him for appointment as

a reserve firefighter. The investigation into the Appellant's residency was warranted and completed in a fair, objective manner by Sgt. Sheehan.

An Appointing Authority is well within its rights to bypass an individual for fudging the truth as part of an application for a civil service position. It is reasonable to infer that a person who does so in order to get a job will be inclined to lie on the job. See Polin v. Randolph, 23 MCSR 229 (2011) (upholding the bypass of a candidate for firefighter due to his dishonesty on his application concerning a poor driving record.)

The City had reasonable justification to bypass the Appellant and has provided sound, rationale reasons for its decision and there is no evidence of inappropriate motivations or objectives on the part of the City that would warrant the Commission's intervention.

For all of the above reasons, the appeal under Docket Nos. G1-11-56 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Marquis, McDowell, and Stein, Commissioners [Ittleman-absent]) on July 12, 2012.

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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice:

Andrew Puglia (for Appellant)

Matthew Buckley, Esq. (for Respondent)

John Marra, Esq. (HRD)