

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

TRISTEN ORTIZ,
Appellant

v.

**TOWN OF
FRAMINGHAM,**
Respondent

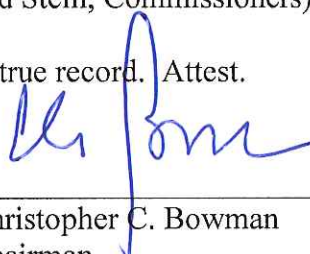
Case No.: G1-12-251

DECISION

The Civil Service Commission (Commission) voted at an executive session on April 4, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated February 13, 2013. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on April 4, 2013.

A true record. Attest.



Christopher C. Bowman
Chairman

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 to:

Tristen Ortiz (Appellant)
Christopher Brown, Esq. (for Respondent)
John Marra, Esq. (HRD)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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February 13, 2013

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108


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CIVIL SERVICE COMMISSION

Re: Tristen Ortiz v. Town of Framingham
DALA Docket No. CS-13-11
CSC Docket No. G1-12-251

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Tristen W. Ortiz
Christopher Brown, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Tristen Ortiz,
Appellant

v.

Docket No. G1-12-251
DALA No. CS-13-11

Town of Framingham,
Respondent

Appearance for Appellant:

Tristen Ortiz, *pro se*


Appearance for Respondent:

Christopher Brown, Esq.
Petrini & Associates, P.C.
372 Union Avenue
Framingham, MA 01702

Administrative Magistrate:

Maria A. Imparato, Esq.

SUMMARY OF RECOMMENDED DECISION

The Appointing Authority has met its burden of demonstrating reasonable justification for the bypass of the Appellant for original appointment as a Framingham firefighter based on his criminal record and his driving record. The Appellant has not demonstrated that the reason for his bypass is untrue, applies equally to the selected candidate and the bypassed candidate, is incapable of substantiation or is a pretext for other, impermissible reasons.

RECOMMENDED DECISION

Tristen Ortiz filed a timely appeal under M.G.L. c. 32, s. 2(b) of the decision of the Town of Framingham (Town) to bypass him for original appointment to the position of Firefighter.

I held a hearing on January 9, 2013 at the office of the Division of Administrative Law Appeals, One Congress Street, 11th floor, Boston, MA.

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CIVIL SERVICE COMMISSION

I admitted documents into evidence. (Exs. 1 – 16.) I marked the Appellant's pre-hearing memorandum "A" for identification, and the Respondent's pre-hearing memorandum "B" for identification. Framingham Fire Chief Gary T. Daugherty, Deputy Fire Chief John C. Magri, and Framingham Police Officer Christopher Pisano testified on behalf of the Town. Tristen Ortiz testified on his own behalf. The hearing was digitally recorded.

FINDINGS OF FACT

1. Tristen Ortiz was a candidate for the position of Firefighter with the Town of Framingham Fire Department. After passing a Civil Service examination, his name appeared first on a list of eligible candidates, Certification 203486, issued by the Commonwealth Human Resources Division (HRD) on January 9, 2012. (Ex. 1.)
2. By letter of June 26, 2012, Framingham Fire Chief Gary T. Daugherty notified HRD that he sought to bypass Mr. Ortiz and remove him from the eligibility list based on his criminal history, employment history, and driving record. (Ex. 8.)
3. By letter of August 21, 2012, HRD informed Mr. Ortiz that the reasons offered by Chief Daugherty "are acceptable for removal." (Ex. 10.)
4. Mr. Ortiz filed a timely appeal on September 6, 2012. (Ex. 9.)
5. Mr. Ortiz signed the certification list in January 2012, indicating that he would accept appointment. On January 24, 2012, the Chief forwarded a Town of Framingham Public Safety Application to all applicants who had signed the list. Mr. Ortiz completed the application on January 29, 2012. (Ex. 3; Testimony, Magri.)
6. Mr. Ortiz then completed a Personal History Questionnaire (PHQ) at the station. The PHQs of all of the candidates were sent to a private company that reviewed the PHQs and

prepared a report listing the critical admissions and serious admissions reflected in each candidate's PHQ. (Testimony, Magri; Ex. 4.)

7. Framingham Police Officer Christopher Pisano was then asked to perform a background check on all candidates, including Mr. Ortiz. Officer Pisano did a CORI check and a driving record check on Mr. Ortiz. (Testimony, Magri, Pisano.)
8. Deputy Chief John C. Magri and Officer Pisano then met with the candidates, including Mr. Ortiz, for a preliminary interview. After the preliminary interviews, Officer Pisano prepared a report for Chief Daugherty summarizing the results of the PHQs, the CORI check and the driving record review of all the candidates. (Ex. 2.) Chief Daugherty is the Appointing Authority for the Framingham Fire Department.
9. After preparing his report for the Chief, Officer Pisano met with Deputy Chief Magri and Chief Daugherty. The Chief then decided which candidates to bypass and which candidates would continue in the hiring process. (Testimony, Magri, Pisano, Daugherty.)
10. Officer Pisano's report to the Chief indicated that Mr. Ortiz made two critical admissions on his PHQ. He admitted that he had been arrested four or more times, and he admitted that he had caused harm to others and had been convicted or pleaded guilty or no contest. Mr. Ortiz's most recent arrest occurred on November 6, 2007 for Assault and Battery. On June 26, 2009, he was placed on probation for 3 years, until June 2012. His probation was terminated after 2 years and 3 months. (Exs. 2, 3, 4, 6, 13.)
11. Mr. Ortiz's CORI report indicates that he pleaded to sufficient facts on an assault charge in 2003. The case was continued without a finding and dismissed. Mr. Ortiz admitted to being in three or more physical fights since the age of 18, the last time related to the 2003 assault charge. (Exs. 2, 8.)

12. Mr. Ortiz admitted to being arrested for urinating in public in 2004 in Florida, for disorderly conduct in 2006 in Florida, for shoplifting in 2000 in Massachusetts, and for domestic violence. (Exs. 2, 4, 5.)
13. Mr. Ortiz made 19 serious admissions, including being expelled or suspended from high school two or more times, and being involuntarily terminated from a job. (Exs. 2, 4.)
14. Regarding the termination, Mr. Ortiz believed he was being verbally abused in his job at Boston Gourmet Chefs in 2011 where he worked in the warehouse and as a driver. Mr. Ortiz told his employer he was going to quit. The employer said that in that case he would fire Mr. Ortiz. (Testimony, Ortiz; Exs. 2, 3, 14.)
15. Mr. Ortiz admitted having 11 or more traffic citations since he began driving, including 4 citations in the previous 3 years. (Speeding 1/2/11; Failure to report an accident 5/13/10; Surchargeable accident 3/17/09; No inspection sticker 9/11/09.) (Exs. 2, 7.)
16. Mr. Ortiz's driving record also demonstrates a lane violation in 2002; failure to stop in 2004; failure to stop in 2007; and a DPW state highway violation in 2010. (Ex. 7.)
17. Chief Daugherty decided to bypass Mr. Ortiz based on his criminal record, his driving record, the fact that he was forced to resign from a job, and the fact that he had just been released from probation. (The Chief had bypassed Mr. Ortiz previously in 2011, and the only thing that changed between 2011 and 2012 was that Mr. Ortiz came off of probation.) By letter of June 26, 2012, Chief Daugherty notified HRD of his desire to bypass Mr. Ortiz for appointment. (Testimony, Daugherty; Ex. 8.)
18. Officer Pisano continued his background check on the candidates that Chief Daugherty decided would move forward in the hiring process. The four candidates who were

eventually hired were [REDACTED]

and [REDACTED] (Ex. 12.)

19. [REDACTED] was convicted of assault and battery in 1995 when he was in high school for a fistfight over his girlfriend. He was suspended from school and placed on probation for one year. [REDACTED] had two traffic accidents in the previous three years, but was found not to be at fault in either accident. He had only one traffic citation from 2004 for marked lanes violation. He had not been terminated or forced to resign from any job. (Ex. 2; Testimony, Pisano; Daugherty.)

20. [REDACTED] had no criminal convictions. His driving license was suspended in 2001 for speeding; in 2002 for 7 surchargeable events, and in 2006 for not paying a seat belt violation ticket. He was involved in surchargeable accident in 2002, and two surchargeable accidents in 2010. [REDACTED] had three speeding tickets in Virginia in 2001, 2006 and 2011. He was never terminated or forced to resign from a job. (Ex. 2; Testimony, Pisano; Daugherty.)

21. [REDACTED] was arrested for possession of marijuana when he was 16 years old. The case was continued without a finding. He was also arrested for trespassing. [REDACTED] was found responsible for two traffic citations: in 2004 for no inspection sticker, and in 2005 for a seatbelt violation. He was found responsible for an accident in 2008. He was not terminated or forced to resign from a job. [REDACTED] is an employee of the Town with a good work record. (Ex. 2; Testimony, Pisano; Daugherty.)

22. [REDACTED] has no criminal convictions. His driver's license was suspended in 2006 for failure to pay a ticket. He was involved in two traffic accidents, but was not found at

fault. He was never terminated from a job or forced to resign. (Ex. 2; Testimony, Pisano, Daugherty.)

CONCLUSION AND RECOMMENDATION

The Civil Service Commission, under M.G.L. c. 31, s. 2(b), is required “to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.”

City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). Justified 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.” *Id.*, at 304. If

the Commission finds by a preponderance of the evidence that there was just cause for an action against the Appellant, the Commission shall affirm the action of the Appointing Authority.

Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). 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, 334 (1983).

If a city is unwilling to bear the risk of hiring a specific candidate, “[a]bsent proof that the city acted unreasonably ... the commission is bound to defer to the city’s exercise of its judgment.” *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 190-191 (2010).

In order to prevail on a bypass case, the Appellant must demonstrate that the reasons offered by the Appointing Authority were untrue, apply equally to the chosen and bypassed candidate, are incapable of substantiation, or are a pretext for other, impermissible reasons.

Borelli v. MBTA, G-1160, 1 MCSR 6, and cases cited.

I conclude that the Town had reasonable justification for bypassing Tristen Ortiz for original appointment as a Framingham firefighter, based on his criminal record and his driving record.

The Appellant was convicted of assault and battery in 2009 and placed on probation for three years, which was later reduced to two years and three months. He pled to sufficient facts in 2003 to charges of assault. He was arrested on at least four occasions. The Appellant's criminal record alone is sufficient to uphold his bypass.

The Commission has long held that an applicant's arrest record, even in the absence of a conviction, is entitled to some weight by the Appointing Authority. *Thames v. Boston Police Dep't.*, 17 MCSR 125, 127 (2004); *Soares v. Brockton Police Dept.*, 14 MCSR 168 (2001); *Brooks v. Boston Police Dep't.*, 12 MCSR 19 (1999); *Frangie v. Boston Police Dep't.*, 7 MCSR 252 (1994).

As the Commission noted in *Antone Matthews v. City of Boston*, 22 MCSR 452 (2009), the City offered an adequate explanation for why an applicant's criminal record would affect his ability to be an effective firefighter when it stated that: "[I]t is the responsibility of firefighters to safeguard the public and enforce the fire prevention and arson laws of the Commonwealth. They may also cite individuals and initiate court actions based on the state fire code and criminal violations related to fire and public safety laws. Firefighters must be honest, trustworthy, and dependable for the effective discharge of duties in a public safety department and cannot be

compromised. Having an extensive criminal record may diminish the Appellant's credibility when he is needed to testify in court and his criminal behavior conflicts with intents and goals of a public safety department."

The Town had reasonable justification to bypass the Appellant based on his criminal record, and specifically, his conviction for assault and battery in 2009.

The Appellant's driving record includes 11 or more citations, including four citations in the previous three years for speeding in 2011, failure to report an accident in 2010, a surchargeable accident in 2009, and no inspection sticker in 2009.

The Commission has held that a poor driving record provides a sufficient basis to bypass an applicant for the position of firefighter. *Ovoian v. Town of Watertown*, 20 MCSR 507 (2007).

The driving record that the Appellant provided to the appointing authority indicates that his driver's license was suspended on four occasions. (Ex. 7.) The Appellant insists that his license was never suspended because he paid the fine for each citation in a timely manner. In support of his contention he submitted exhibit 16 that seems to indicate that the fines were paid. I did not, therefore, find as fact that the Appellant's license was suspended on four occasions.

I conclude that the Town had reasonable justification to bypass the Appellant based on his poor driving record, even without four license suspensions.

With respect to the fact that the Appellant was terminated from his job at Boston Gourmet Chefs, I conclude that the Appellant voiced his intention to quit prior to being terminated. I conclude that the Town did not have reasonable justification to bypass the Appellant based on this incident.

In order to prevail in a bypass case, the Appellant must demonstrate that the reasons proffered by the Appointing Authority were untrue, apply equally to the selected candidate and

the bypassed candidate, are incapable of substantiation, or are a pretext for other, impermissible reasons. *Borelli v. MBTA*, 1 MCSR 6. The Appellant has not met this burden.

With respect to the issue of a criminal record, two of the chosen candidates had convictions as a juvenile. The other two candidates had no criminal record. The Appellant's criminal history is worse than any of the chosen candidates and thus shows a reason to bypass him.

With respect to the issue of driving record, all of the chosen candidates had driving infractions, but only one chosen candidate, [REDACTED], had a driving record as troubling as the Appellant's. [REDACTED], however, has no criminal record. The driving records of these candidates are troubling, but the Appellant's driving record plus his criminal history makes him the worst candidate of the group, and thus justifies his bypass.

The Appellant argues that Deputy Chief Magri has been involved in an ongoing dispute with Framingham firefighter Louis Torres, who is the best friend of the Appellant's father. The Appellant did not ask Deputy Chief Magri about this issue during cross examination, and the Appellant admitted that he had no proof that Deputy Chief Magri advised Chief Daugherty to bypass the Appellant because of Magri's dispute with Torres. I conclude that the Appellant has not demonstrated that favoritism, bias or political considerations played any part in the decision of the Appointing Authority to bypass him for original appointment as a firefighter.

I recommend that the Appellant's appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imperato
Maria A. Imperato
Administrative Magistrate

Dated: **FEB 13 2013**