

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION  
One Ashburton Place – Room 503  
Boston, MA 02108  
(617) 727-2293**

**JAMES D. PACHECO,**

*Appellant*

**CASE NO. G1-18-010**

v.

**CITY OF NEW BEDFORD,**

*Respondent*

Appearance for Appellant:

James D. Pacheco, Pro Se

Appearance for Respondent:

Elizabeth Treadup Pio, Esq.  
Associate City Solicitor  
New Bedford Law Department  
133 William Street  
New Bedford, MA 02740

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, James Pacheco, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), to contest his bypass for appointment as a Firefighter with the New Bedford Fire Department (NBFD).<sup>1</sup> A pre-hearing conference was held on February 13, 2018, and a full hearing, which was digitally recorded,<sup>2</sup> was held on June 8, 2018, both at the UMass School of Law in Dartmouth. Eight exhibits (Exh.1 through Exh.8) were received in evidence. The Commission received post-hearing submissions from the Appellant by e-mail on June 21, 2018 and October 1, 2018 and received a Proposed Decision on behalf of the NBFD on October 1, 2018.

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<sup>1</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.

<sup>2</sup> Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the 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.

## **FINDINGS OF FACT**

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

*Called by the Appointing Authority:*

- Nbfd Chief Michael Gomes
- Nbfd District Chief Scott Kruger
- Nbfd Captain Brandon Silva
- Nbfd Captain Gary Raposa
- Nbfd Lieutenant Stephen Peixoto

*Called by the Appellant:*

- James Pacheco, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, James D. Pacheco is a life-long resident of New Bedford who graduated from New Bedford Regional Vocational Technical High School. He is employed as machinist/welder operating and repairing hydraulic motors, pumps, valves and cylinders. He is a decorated veteran who has been deployed to Iraq and Afghanistan as an infantryman with the Massachusetts Army National Guard, where he has served since 2005 and currently holds the rank of Sergeant (E-5). (*Exhs. 5 & 6; Testimony of Appellant*)

2. Mr. Pacheco took and passed the civil service Firefighters' examination administered by the Massachusetts Human Resources Division (HRD) and his name was placed on the eligible list established on November 4, 2016 and which expired on November 30, 2018. (*Exh.3; Testimony of Appellant*)

3. On August 1, 2017, HRD issued Certification #04863 authorizing New Bedford to hire five (5) permanent full-time firefighters for the Nbfd. Mr. Pacheco's name appeared in the 8<sup>th</sup> ranking on the certification. (*Exh.3*)

4. Mr. Pacheco signed Certification #04863 as willing to accept appointment and duly submitted an Application for Appointment on August 2, 2017. (*Exh.6*)<sup>3</sup>

5. The 2017 application was the second time Mr. Pacheco had applied for appointment as an Nbfd Firefighter. His first application was submitted on September 8, 2016, pursuant to a certification from the prior eligible list. (*Exh.5; Testimony of Appellant*)

6. During the prior 2016 hiring cycle, Nbfd District Chief Scott Kruger, the supervisor of background investigations for the Nbfd, conducted a full background investigation into Mr. Pacheco's application, assisted by Nbfd Captain Brandon Silva. On September 27, 2016, Deputy Chief Kruger submitted a report of his findings to Nbfd Fire Chief Michael Gomes. (*Exh.4; Testimony of Chief Gomes, Dep. Chief Kruger & Capt. Silva*)

7. Deputy Chief Kruger's report found three problematic circumstances involving Mr. Pacheco's background and application.

- Mr. Pacheco listed his current "Address" as [# redacted] Arnold Street in New Bedford, and stated he had "lived" at that address for 22 years. The residence turned out to be the home of Mr. Pacheco's father, who said that his son had not lived with him for several years, but now lived with his girlfriend somewhere on Fair Street. After some further investigation, Mr. Pacheco's actual Fair Street residence was located. Dep. Chief Kruger attached a photograph of the mailbox on the porch showing Mr. Pacheco's name.
- A search of public postings on social media turned up three postings by Mr. Pacheco in August and September 2013 which contained rants, peppered with obscenities, about the difficulties he had getting a job after military service, disparaging remarks about an "over privileged" kid "who drives his moms Mercedes", referring to another military person as a "f--ing POG"[person other than a grunt, i.e. a paper-pusher vs, an infantryman] and to the "f--ing crooked civil service/affirmative action bulls—t", and even one threatening remark: "Be thankful I didn't smash your face into a cupholder . . . ."
- A visit to the New Bedford District Court turned up a record of what appeared to be a 2005 felony conviction for larceny over \$250.

(*Exhs.4 & 8; Testimony of Dep. Chief Kruger*)

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<sup>3</sup> At the time of the 2017 hiring cycle, the Nbfd used a standard four (4) page application form, which the applicant signed to be "true and complete", that contained six sections: Residence and Personal Data; Education; Employment History, Military History; Special Training and Skills and Additional Comments and Work Experience. The applicant also executed release forms authorizing the Nbfd to conduct a CORI (criminal records) check, RMV check and a general release to obtain "information pertaining to me" from any other person or entity. (*Exhs. 5 & 6*)

8. Despite the negative aspects contained in his background investigation report, Chief Gomes scheduled Mr. Pacheco to meet on October 5, 2017 with the interview panel of three NBFD officers: Chief Gomes, another superior officer (Capt. Gary Raposa), and an officer representing the firefighters' union, Local 841, I.A.F.F. (Lt. Stephen Peixoto). (*Exh.7A-7C; Testimony of Chief Gomes, Capt. Raposa & Lt. Peixoto*)

9. The interview was conducted in a semi-structured form, with all candidates being asked the same questions designed by Chief Gomes, with each panel member provided a score sheet to take notes and score the candidate's performance on each question as well as on six overall characteristics (1-Below our Standards; 2-Good; 3-Excellent). Save for the answers to the final two questions described more specifically below, the three interview panelists scored Mr. Pacheco "Good" or "Excellent" in nearly every other answer and category. (*Exh.7A-7C; Testimony of Chief Gomes, Capt. Raposa & Lt. Peixoto*)

10. The final interview questions were more open-ended, designed to draw out information (positive or negative) specific to the particular candidate. In particular, Q.11 asked:

"As you know, there will be a background check. Is there anything you would like to contribute or that we may discover as the process moves forward?"

In response to Q.11, Mr. Pacheco initially answered: "No sir". At that point Chief Gomes brought up the three negative issues generated by the (already completed) background investigation.

- As to the residence discrepancy, Mr. Pacheco explained that he used his father's address because Fair Street was not a "good neighborhood" and he was uncomfortable using that address because he was concerned that the mail would not get to him there. Chief Gomes found this explanation unsatisfactory, noting that the application specifically asked for the address where the applicant "lived", not a mailing address.
- As to the Facebook postings, Mr. Pacheco was forthcoming, admitting that he had made the postings and that it was not "his finest hour" and he did not currently post on social media, was a different person now, having settled down, married and started a family. He also stated that he no longer maintained those social media accounts or posted online the

way he had in the past. The postings still troubled all the interview panelists because there were multiple postings, they had occurred less than three years ago, and (although the accounts may have been deleted) the postings remained on-line and were available for public access.

- As to the felony conviction, Mr. Pacheco stated that he pleaded guilty initially because he was about to be activated and fighting the charges would have prevented him from doing so. He said that, later, the case was “revised and revoked” and all charges dismissed. He stated that his attorney said something to the effect that would mean there would be nothing on his record.<sup>4</sup>
- All interview panelists were troubled by what they called a “lack of candor” on Mr. Pacheco’s part for failing to raise these issues of concern before he was confronted with them.

*(Exhs.7A-7C & 8; Appellant’s Post-Hearing Submission dated June 21, 2018; Testimony of Appellant; Chief Gomes, Capt. Raposa & Lt. Peixoto)*

11. Based on the three negative issues discovered during the background investigation, as well as Mr. Pacheco’s lack of candor in addressing those issues during his interview, Chief Gomes decided that Mr. Pacheco would be bypassed. Mr. Pacheco did not appeal that decision.

*(Testimony of Appellant & Chief Gomes)*

12. When Mr. Pacheco submitted his 2017 application, he changed the answer about his “Address”, giving the Fair Street address as his “current” residence for the past three years.

*(Exh.6)*

13. Mr. Pacheco’s corrected (truthful) 2017 application, however, did not change Chief Gomes conclusion that Mr. Pacheco had been untruthful on his 2016 application, and that, while his past actions were not a “forever” bar to possible future appointment, too little time had passed to give him further consideration for hiring in the current cycle. Accordingly, Chief Gomes decided that Mr. Pacheco did not need to be given another interview and would be

bypassed again. *(Testimony of Chief Gomes)*

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<sup>4</sup> The criminal docket does appear to indicate that the court did allow a motion to “revise and revoke” the original disposition, but does not fully explain exactly what happened to result in the charges being “dismissed”. At the Commission hearing, Mr. Pacheco noted that he held an unrestricted Class A firearms license, issued by the New Bedford Police Chief, which I infer he would not have received had there been a felony conviction on his record. *(Exh.8; Testimony of Appellant; Appellant’s Post-Hearing Submission dated June 21, 2018)*

14. By letter dated November 30, 2017, Chief Gomes informed Mr. Pacheco that he had been bypassed. The letter noted Mr. Pacheco's "good references" and "good prior military record", but stated, as reasons for the bypass: (1) the 2016 false statement about his residence; (2) the 2013 Facebook postings; (3) the 2005 felony conviction; and (4) failure to be forthcoming about those issues until the results of the Nbfd's background investigation were disclosed. (*Exh.2*)

15. This appeal duly ensued. (*Claim of Appeal*)

### **APPLICABLE CIVIL SERVICE LAW**

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev.den., 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31,§27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31,§2(b) for de novo review by the Commission. The Commission's role is to determine whether, by a preponderance of evidence, the appointing authority had "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of a candidate's background and qualifications sufficient to form a "credible basis" to believe allegations of misconduct or other facts that present "legitimate doubts" about the candidate's present fitness to perform the duties of the position. Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003).

"Reasonable justification . . . 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' ". Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211,214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission --

" . . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are "*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*, then the occasion is appropriate for intervention by the commission." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L.c.31,§2(b), gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." Id.

## ANALYSIS

New Bedford has established by a preponderance of the evidence that its decision to bypass the Appellant was reasonably justified after an impartial and reasonably thorough review disclosed a “credible basis” for “legitimate doubts” about his present suitability to serve as an Nbfd firefighter. Although the Nbfd’s conclusion about Mr. Pacheco’s felony conviction, which the evidence discloses to be mistaken, would not be a proper basis for bypass, the other reasons stated are sufficient to justify the November 2017 decision to bypass him.

First, the Nbfd was fully warranted to conclude that the 2013 Facebook postings demonstrated a level of indiscretion and offensive behavior that is incompatible with the high standards of professionalism, sound judgment and integrity that the Nbfd may reasonably expect of those in whom it entrusts with the duty to serve the public in the fire service. Mr. Pacheco asked that this behavior be discounted as uncharacteristic of the individual that he has become. If that is, indeed true, bypassing him for past behavior that is not indicative of present suitability would not be sufficient to support “reasonable justification”. That determination, however, is one to be made by the Nbfd and the Commission’s role does not permit it to substitute its own judgment in such matters for the judgement of the Nbfd made in the reasonable exercise of its discretion where, as here, that judgment call has been made after a reasonably thorough review free of any personal or political bias.

Several facts support the reasonableness of the Nbfd’s conclusion that Mr. Pacheco’s 2013 behavior gave them “legitimate doubts” about his present suitability for appointment. The events, which occurred in 2013, when he was in his late 20’s, cannot be said to be so far removed from the present for their consideration to be unreasonable. Moreover, Mr. Pacheco had the opportunity to clear his record on this subject during the interview but failed to do so. Whether



he “forgot” about the postings or not, his failure to be forthcoming about this serious lapse in judgment is also a factor that the Nbfd could properly weigh in assessing the risk that this prior behavior presented. How long the Nbfd may reasonably rely on this deficiency in making a future hiring decision is not a question that the Commission need answer at this time.

Second, whether Mr. Pacheco’s mistaken use of a former residence as his “current” address is a reasonable justification to bypass him for making a “false” statement on his 2016 application is a closer call. The Nbfd points out that the application clearly asks how long the applicant has “lived” at the address he provides, so there is little room for ambiguity in what address was being requested. Chief Gomes acknowledged that, while such a mistake is considered a “red flag”, and would be automatically disqualifying when the misrepresentation related to a false claim to residency preference, he could point to no ulterior or underlying fact that Mr. Pacheco was trying to conceal. I found Mr. Pacheco’s explanation credible – he was not attempting to conceal anything that reflected negatively on himself. Nevertheless, I also cannot discount the fact that the application is clear and Mr. Pacheco knew or should have known that he did not answer the question as required. He did provide his correct residence on his 2017 application and, had that been the only continuing issue from 2016 (which it was not, as noted above), it would probably not have been enough to have justified this bypass.

Third, Mr. Pacheco presented credible evidence that the Nbfd misread the docket on the 2005 criminal case and, in fact, he does not have a felony conviction on his record. The fact that he holds an unrestricted Class A firearms license issued by the New Bedford Police Chief, support that conclusion by a preponderance of the evidence. While the docket sheet itself is open to some interpretation, on its face, without further investigation, it does not, and would not in the future, support a bypass on the grounds of a felony conviction. Nor would Mr. Pacheco’s

failure to volunteer information about this criminal case, which he reasonably believed had been “revised and revoked”, i.e., dismissed, be reasonable justification for a bypass. Once asked about it for the first time at the 2016 interviews (no questions about criminal record appeared on the application itself), he was fully “forthcoming” and truthful about the case.

### **CONCLUSION**

For the reasons stated herein, this appeal of the Appellant, James D. Pacheco, is *denied*.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

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. 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:

James D. Pacheco (Appellant)

Elizabeth Treadup Pio, Esq. (for Respondent)

Melissa A. Thomson, Esq. (HRD)