

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200

Boston, MA 02114

KEVIN PROPHETE,

Appellant

G1-22R-088

v.

CITY OF SOMERVILLE,

Respondent

Appearance for Appellant:

Gary Pelletier, Esq.
Pelletier, Clarke & Caley, LLC
35 Touro Street
Newport, RI 02840

Appearance for Respondent:

Bonnie Borch-Rote, Esq.
Assistant City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Commissioners:

Paul M. Stein
Shawn C. Dooley

Summary of Decision

The Commission affirmed the decision of the City of Somerville to bypass the Appellant for original appointment as a firefighter based on the demonstrated inconsistencies about his residency during the application process.

DECISION

On June 15, 2022, the Appellant, Kevin Prophete (Appellant), pursuant to the provisions of G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the Mayor of the City of Somerville (Somerville) to bypass him for appointment as a permanent

full-time firefighter for the Somerville Fire Department (SFD).¹ The commission held a remote pre-hearing videoconference on July 12, 2022, and an in-person full hearing at the Commission's Boston office on January 17, 2023. Following the initial day of hearing, by agreement of the parties, the appeal was dismissed nisi, to permit the parties to conclude a settlement of the dispute. When the settlement could not be consummated, the Commission reopened the appeal² and held a second day of full hearing in Boston on May 15, 2023. The full hearings were audio/video recorded via Webex.³ For the reasons set forth below, The Appellant's appeal is denied.

FINDINGS OF FACT

Nine exhibits were introduced into evidence during the hearing (*Resp.Exhs.1 through 9*) and the Appellant submitted two post-hearing exhibits (*App.PH.Exhs.1 & 2*).⁴ Based on the documents submitted and the testimony of the following witnesses:

Called by the City of Somerville:

- Anne Gill, Director of Human Resources, City of Somerville
- Charles Breen, Chief Engineer [Fire Chief], SFD
- Christopher Major, Assistant Fire Chief, SFD

¹ 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.

² The reopened appeal resulted in a docket number change from G1-22-088 to G1-22R-088.

³ A link to the audio/video recording was provided to the parties. 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 they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

⁴ Resp.Exh.9 was marked CONFIDENTIAL. App.PH.Exhs.1 & 2 (Appellant's amended tax returns for 2019 and 2020) were received in evidence, de bene. As further explained in the Analysis, these documents are now admitted solely for the limited purpose of establishing the changes that the Appellant made to his tax returns after his bypass and the dismissal nisi of the appeal. Somerville's Motion to Strike the exhibits is allowed in part and denied in part and the right of both parties to object to this ruling is saved.

Called by the Appellant:

- Kevin Prophete, Appellant
- Frandiane Prophete, Sister of Appellant

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

1. The Appellant, Kevin Prophete, is a male in his mid-30s who currently resides in Everett, MA. He was raised in Somerville, MA and graduated from Somerville High School. (*Resp.Exh.2; Testimony of Appellant*)

2. The Appellant is a certified automotive repair technician with approximately 15 years' experience, most recently as a lead technician for a national car rental company. (*Resp.Exhs.2 & 3; Testimony of Appellant*)

3. The Appellant took and passed the civil service examination for entry-level firefighter, which was originally scheduled to be administered by the state's Human Resources Division (HRD) in March 2020, but postponed due to the COVID-19 state of emergency until January 6, 2021. (*Stipulated Facts*).

4. HRD issued Certification No. 08119 to Somerville on September 20, 2021, authorizing the original appointment of eight SFD firefighters. The Appellant was ranked 13th (tied) among the eligible candidates. (*Stipulated Facts; Resp.Exh.1*)

5. On September 29, 2021, the Appellant submitted his application for appointment as a firefighter (Application), claiming a preference as a Somerville resident. (*Resp.Exh.2*)

6. The Appellant signed the City's Applicant Rules Regarding Employment Application Procedures - Somerville Fire Department, as well as a list of required documents that needed to be

timely submitted. The Appellant was aware that there was a deadline to submit application materials. (*Resp.Exh.2; Testimony of Appellant*)

7. The application instructions also state, in boldface type, that failure to answer all questions truthfully, accurately, or completely shall result in disqualification, and that honesty and candor in answering the questions in this application are valued above all else. The Appellant was aware of these instructions. (*Resp.Exh.2; Testimony of Appellant*)

8. As part of the hiring process, a private investigator performed a background check on the Appellant, which was concluded on or around November 11, 2021. (*Resp.Exh.3; Testimony of Chief Breen & Ass't Chief Major*)

9. The background investigation includes, among other things, checking the candidate's driver history and residency. (*Resp.Exh.3; Testimony of Chief Breen & Ass't Chief Major*)

10. Somerville uses a five-year look-back period for purposes of assessing a candidate's driving record. (*Resp.Exh.3; Testimony of Chief Breen & Ass't Chief Major*)

11. The Appellant's driving history showed two entries for the five-year period prior to his application: (a) January 2018 – no inspection sticker⁵ and (b) March 2017 – surchargable accident – property damage. Older infractions on the driving record included two seat-belt violations (2012 & 2015), an inspection sticker violation and a speeding ticket (2014), two other speeding tickets (2010), improper operation (2009) and a surchargable accident – collision (2008). (*Resp.Exh.3*)

12. On the first page of his application, the Appellant provided a Somerville address as his current address as of the date of his application, but on the next page stated that he presently resided in Everett. (*Resp.Exh.2; Testimony of Appellant*)

⁵ Mr. Prophete was operating his father's truck when he was cited for this violation. (*Testimony of Appellant*)

13. The Appellant indicated on one page of the application that he lived in Somerville from January of 1995 to January of 2013, then in Everett from January 2013 to January of 2017, in Somerville from January 2017 to May of 2021, then back in Everett. On a separate page that asked for the timeframe that he lived with relatives, significant others or roommates, he stated that he lived in Somerville with family members from 1987 to the present and also stated that he had lived with a girlfriend in Everett for four years but did not supply a timeframe. (*Resp.Exh.2; Testimony of Chief Breen and Ass't Chief Major.*)

14. As part of his application, the Appellant submitted federal tax information that listed Everett as his primary residence for calendar years 2019 and 2020, as well as a 2020 state tax return, also listing Everett as his residence. He also provided a copy of his 2019 W-2 for his part-time work for the City of Somerville that was sent to him at the family home in Somerville listed on his application. (*Resp.Exhs.2 & 9*)⁶

15. Other indicia of the Appellant's residency included telephone bills and bank statements during the period from March 2019 to March 2020 addressed to the Appellant in Somerville, and insurance statements and excise tax bills showing a motor vehicle garaged at the family home in Somerville. (*Resp.Exhs.2, 3 & 7*)

16. The background investigator spoke with two residents in the Somerville neighborhood where the Appellant's family home was located, both of whom had known him for more than 10 years and described him as a "great guy" and "great neighbor." (*Resp.Exh.3*)

⁶ The Appellant filed transcripts of his federal tax returns produced by the Internal Revenue Service rather than copies of the filed returns. The information contained in those transcripts is substantially identical to what is contained in the filed returns. The Appellant was one week late in filing his insurance coverage documents, did not file paper copies of his 2020 state tax return until January 2022, and was unable to procure a 2019 state tax return. (*Resp.Exhs.2 ,4 7 & 9; Testimony of Appellant*)

17. Ms. Frandiane Prophete (Ms. Prophete), the Appellant's older sister, has lived at the family home in Somerville her whole life except when she served in the U.S. Marine Corps. After military service, she worked briefly for the Middlesex Sheriff's Office and, since 2015, has been employed as a sworn police officer with the Somerville Police Department. (*Testimony of F. Prophete*)

18. Officer Prophete could not recall precisely when her brother moved to Somerville from Everett, but she remembers him living in Somerville with her during the period from March of 2019 to March of 2020, when his room was down the hall from her bedroom, and she saw him there nearly every day. (*Testimony of F. Prophete*)

19. Officer Prophete was aware that her brother currently lived with his girlfriend in Everett but did not know when he moved there from Somerville. (*Testimony of F. Prophete*)

20. Officer Prophete did not know who lived in the Everett home owned by the Appellant in the past. (*Testimony of F. Prophete*)

21. On January 12, 2022, the Appellant was interviewed by a three-member panel that included Anne Gill, Somerville HR Director, Charles Breen, SFD Chief Engineer, and SFD Assistant Fire Chief Christopher Major. The interviews were audio recorded and the panel was the same for each candidate. The panel members took notes during the interviews, but the candidates' performances were not scored or ranked. (*Resp.Exhs.5 and 6; Testimony of Chief Breen and Asst. Chief Major*)

22. During the interview, the panel asked the Appellant about inconsistencies in his residency status. (*Resp.Exh.6; Testimony of Chief Breen, Ass't Chief Major & Gill*)

23. When asked why he filed tax returns for 2020 and 2019 with Everett as his primary residence, when he claimed to be living in Somerville at that time, the Appellant told the panel: "I had to list it that way . . . because of the way the mortgage was written up, otherwise it would essentially incriminate me for not living in the residence when I'd have to redo my mortgage and

things like that “ The Appellant told the panel that doing his taxes that way was “kind of just a normal thing.” (*Resp.Exh.6; Testimony of Chief Breen and Ass’t Chief Major*)⁷

24. During his panel interview, the Appellant stated that he had been renting the property and received payments to cover the mortgage, but no rental income was reported on the tax returns. He also was not clear on the time frame of when he and his girlfriend lived in Everett, also mentioning other unnamed “roommates.” (*Resp.Exh.6 & 9; Testimony of Appellant*)

25. The Appellant paid all utilities and homeowner’s insurance for the Everett house. He did not inform the insurance company that he did not reside there. (*Testimony of Appellant*)

26. When asked by the panel where he resided at the time of the interview, the Appellant stated: “[R]ight now [Everett] is under construction . . . his intentions are to live in the [Everett] house when it’s done” and began to describe renovations to the Everett property. (*Resp.Exhs.2 and 6*)

27. By letter dated April 19, 2022, Mayor Ballantyne informed the Appellant that he had been bypassed for appointment as a firefighter. The bypass letter stated: “The requirements to be a firefighter include attention to detail, being timely, honesty, and integrity. Turning in documents past the deadline, possessing two addresses, not reporting income to federal and state authorities, and having a spotty driving record has led the City to come to the decision to bypass you for the position of firefighter.” (*Resp.Exh.4*)

28. In particular, the bypass letter cited the following reasons for the decision:

- (a) Failure to complete the application “in a timely manner”, citing the filing of federal tax return electronic transcripts in lieu of copies of the paper returns, delayed filing of the 2020 state tax return in January 2022, failure to file a copy of the 2019 state tax return, and the one-week delay in filing requested insurance documents.
- (b) Simultaneously claiming residency in Somerville and Everett as his residence at different places in the application documents and “[w]hen asked about this

⁷ During the testimony before the Commission, Mr. Prophete changed his explanation to instead state that residency was not a requirement of his mortgage. (*Testimony of Appellant*)

discrepancy, you explained you use the Everett address so your mortgage company would believe you occupy the residence These statements are inconsistent and call into question whether you are being dishonest with the City, or your mortgage company.”

- (c) A “spotty driving record”, citing “ongoing motor vehicle violations up to 2018 including driving without a seat belt and driving with an expired inspection sticker.”

(Resp.Exh.4)

29. Three candidates ranked below the Appellant on Certification No. 08119, all Somerville residents, were recommended for appointment instead of the Appellant. *(Resp.Exh.4)*

30. On May 25, 2023, the Appellant filed amended federal tax returns for the years 2019 and 2020 changing the “current home address” reported on page one of each return from his Everett address to his family home address in Somerville. The itemized deduction claimed on Schedule A, including home mortgage and real estate taxes paid on the Everett property, did not change. The total tax refund amount also did not change. *(App.PH.Exhs.1 & 2; Testimony of Appellant)*

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).

Original appointments of civil service employees are made from a list, called a “certification”, with candidates’ names ranked in the order in which they appear 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. An appointing authority must provide specific, written

reasons – positive or negative, or both -- consistent with basic merit principles – for 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 the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); 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); http://web2.westlaw.com/find/default.wl?mt=Massachusetts&db=578&rs=WLW15.04&tc=-1&rp=/find/default.wl&findtype=Y&ordoc=2029136022&serialnum=2023501172&vr=2.0&fn=_top&sv=Split&tf=-1&pb=70F732C1&utid=1Leominster 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, 243 (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”).

The governing statute, G.L. c. 31, 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 that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). 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.” *Id.* (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm’n., 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm’n., 43 Mass. App. Ct. 300, 303-305, *rev. den.*, 428 Mass. 1102 (1997); Police Comm’r v. Civil Service Comm’n., 22 Mass. App. Ct. 364, 371, *rev. den.* 398 Mass. 1103 (1986).

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 O’Brien v. Somerville, 25 MCSR 292 (2012). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Polin v. Randolph, 23 MCSR 229 (2011). However, the serious consequences that flow from finding that an applicant violated the duty of truthfulness require that such charges be carefully scrutinized so that an applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016); Morley v. Boston Police Dep’t, 29 MCSR 456 (2016); Lucas v. Boston Police Dep’t, 25 MCSR 420 (2012) (mistake about appellant’s characterization of past medical history).

ANALYSIS

Somerville established by a preponderance of the evidence that the decision to bypass the Appellant was made after a thorough review of his suitability and was reasonably justified. Although his errors and omissions in his application papers and his alleged “spotty driving record”

do not justify his bypass, the Appellant's lack of candor about his residency raised sufficient doubt about his honesty to provide reasonable justification to bypass him for appointment.

First, the undisputed evidence established that, in 2021, when the Appellant applied to become a Somerville firefighter, he claimed to reside in Somerville during 2019 and 2020 for purposes of asserting a preference as a Somerville resident and that he simultaneously claimed to live in Everett during that same time for purposes of his 2019 and 2020 tax returns. The Appellant also admitted that he used an Everett address on his tax returns, although he did not actually reside there in 2019 and 2020, because "it would essentially incriminate me for not living in the residence" and "I'd have to redo my mortgage and things like that" Thus, the preponderance of the evidence established that the Appellant made inconsistent claims to residency knowing he needed to live in Somerville for purposes of taking the civil service examination but needed to pretend to live in Everett to claim deductions as a homeowner of that property.⁸

Second, the Appellant's demeanor and inconsistent responses when presented with questions about his residency during his SFD interview and during his testimony before the Commission reinforce the conclusion that he knew his behavior was not a simple "honest" mistake, but, rather, that his claim to "dual" residency was a serious misrepresentation. He originally admitted that he knew that he needed to claim to live in Everett in order to legitimately claim deductions on his tax

⁸ Although some evidence exists to the contrary, the preponderance of the evidence does tend to support the inference that the Appellant did, in fact, move back to Somerville prior to March 2019, knowing that such a move was necessary to claim residency preference on the civil service examination he planned to take in March 2020. If the Appellant had not lived in Somerville from March 2019 through March 2020, his name would have been placed on the eligible list as a non-resident, below all Somerville residents and, therefore, he would not have been high enough on Certification No.08119 to have been eligible for consideration. Under that scenario, he would not have been "bypassed". As Somerville's bypass letter did not assert that failure to establish residency was a reason for his non-selection, the Commission need not make no explicit finding about the residency preference.

returns for his mortgage and other expenses of the Everett property, and he could not admit that it was a rental property and no longer his primary residence. However, when he was pressed with questions about it, he gave inconsistent answers as to when he actually spent any nights in Everett and whether he did or did not collect rent or had his girlfriend “help out” with the mortgage (which he did not report on his income tax returns). At one point, he claimed that actual residence in Everett was not a condition of his mortgage. The fact that he subsequently amended his tax returns to change his address from Everett to Somerville (when it helped his claim to residency in this bypass appeal), fails to show that he has taken full responsibility for his prior misrepresentations, seeing as how he was still claiming the same tax deductions as if Everett were his primary residence. Somerville was reasonably justified to consider the Appellant’s behavior at the time of his application for appointment to the SFD as an unacceptable fudging of the truth and a legitimate basis to bypass him for appointment for that reason.

Third, the fact that the Appellant has been living in Everett since May 2021 does not cure the prior misrepresentations for the years he claimed he did not live there when he sought to become an SFD firefighter. Indeed, it actually complicates the situation. The Commission must review a bypass decision based on the information available to Somerville at the time of the bypass decision.⁹ Although Somerville, to its credit, was willing to reconsider the Appellant in a future hiring cycle, provided he took full responsibility for his mistakes and rectified them, the Appellant had not taken the next civil service examination and his eligibility as a Somerville resident expired

⁹ For this reason, the Appellant’s amended tax returns (App.PH.Exhs.1 & 2) are admitted solely for the limited purpose of showing the action the Appellant had taken after his bypass to acknowledge his prior mistakes, but they are not admitted for purposes of disputing the bypass decision, as they were not available to Somerville at the time of the bypass decision and they do not fully mitigate the serious misrepresentations made at that time which support the reasons for the bypass.

before another hiring cycle occurred. Accordingly, as the bypass of the Appellant was reasonably justified, the Commission is not authorized to grant the Appellant, who is no longer a Somerville resident, further relief by placing him on any future certifications above other Somerville residents who did take and pass the next examination.

Fourth, the other two reasons stated by Somerville for bypassing the Appellant are problematic. The Appellant's driver history cited by Somerville consists of a 2018 inspection sticker violation (while driving his father's truck) and a 2015 seat belt violation (outside the five-year look-back period used by Somerville to assess driver history). These minor infractions fall short of the "spotty driver history" that would reasonably justify bypassing an otherwise qualified candidate. Similarly, Somerville's claim that the Appellant failed to supply written copies of his tax returns (when he provided equally, if not more comprehensive, electronic transcripts supplied by the IRS) and was a week late in supplying insurance documentation, would not, alone, have justified this bypass. As the primary reason for the decision to bypass the Appellant was reasonably justified, however, failure of these other reasons to constitute reasonable justification does not change our decision to deny the Appellant's appeal.

CONCLUSION

For the reasons stated herein, the Appellant's appeal under Docket No. G1-22R-088 is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

/s/ Shawn C. Dooley

Shawn C. Dooley, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, & Tivnan, Commissioners) on November 30, 2023.

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 to:

Gary Pelletier, Esq. (Appellant)

Bonnie Borch-Rote, Esq.. (for Respondent)