

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JOHN SAILOR,
Appellant,

v.

G1-07-188

CITY OF MEDFORD,
Respondent.

Appellant's Attorney:

Frank J. McGee, Atty.
1952 Ocean Street
Marshfield, MA 02155

Respondent's Attorney:

Mark E. Rumley, City Solicitor
City of Medford Law Department
City Hall – Room 206
85 George P. Hassett Drive
Boston, MA 02120

Commissioner:

Daniel M. Henderson¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, John Sailor, (hereinafter, "Mr. Sailor" or "Appellant") filed this appeal with the Civil Service Commission (hereinafter "CSC") on May 21, 2007, claiming that the Respondent, Mayor City of Medford (hereinafter "City") as Appointing Authority, bypassed him for original appointment as a permanent, full-time firefighter for the Medford Fire Department (hereinafter "Department") by removing Appellant's name from the eligibility list. A full hearing was held in the Commission's offices on May 2, 2008. Witnesses offering

¹ The Commission acknowledges the assistance of Legal Intern Kelly Deegan in the preparation of this Decision.

sworn testimony were not ordered to be sequestered. One audiotape was made of the hearing. The parties submitted proposed decisions thereafter.

FINDINGS OF FACT:

Ten (10) exhibits were entered into evidence at the hearing. Exhibit 9 is the HRD document packet filed with the Commission. Exhibit 6 was objected to by Appellant. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Frank A. Giliberti, Chief, Medford Fire Department

For the Appellant:

- John Sailor, Appellant;

I make the following findings of fact:

- 1) The Appellant is nearly a life-long resident of Medford, having lived there off and on since age 2. He served his country four (4) years in the United States Marine Corps from 1978 to 1982, thereupon receiving an Honorable Discharge. He is divorced and has custody of his two daughters. (Testimony of Appellant)
- 2) Sometime in 2006, Medford requested a certification list from HRD to hire six (6) permanent, full-time firefighters. However, the Requisition (Form 13) is signed by the appointing authority, the Mayor, but not dated as required. (Exhibit 4)
- 3) On June 2, 2006, Certification No. 260552 was issued and the Appellant's name appeared eighth on this list. This certification clearly stated that 7 permanent full-time firefighters, (1 protected minority), must be selected of the 7 highest, of the first 15, (2N+1) who will accept appointment. This certification also clearly stated that it would be void if not acted upon within 12 weeks from its date unless an

extension is requested in writing and approved. Time is of the essence for the proper processing of certifications by both the appointing authorities and HRD.

No evidence was presented of any written and approved extension of this certification. (Administrative notice, reasonable inferences, Exhibits and testimony, Exhibits 5& 9)

- 4) The process for appointing firefighters in Medford is as follows: candidates are chosen from the certification list and, if they are willing to accept the position, attend an orientation where they receive an application and hair samples are taken for a drug screening. If they pass the screen and return the applications, a background check is conducted, they are interviewed by the Chief, they undergo a psychological and medical evaluation, the Chief gives his recommendations to the Mayor, and they take a PAT test. After this process is completed, the candidates are selected by the Mayor, based on recommendations from the Fire Chief.

(Testimony of Giliberti)

- 5) On March 7, 2007, by letter, the appointing authority- Mayor made his final selections from certification #260552 and also stated his reasons, (by attachment or enclosures) for bypassing candidates for appointment. However that letter is signed by another, by initials ("MER") for the Mayor. The Mayor apparently, by an unsigned and undated attachment to that letter also requested a PAR 9 removal of the Appellant from Certification 260552 citing as the reason that the Appellant "failed two (2) previous drug screenings for two (2) prior hiring processes with the Medford Fire Department. As a result, the Medford Fire Department does not recommend Mr. Sailor as a suitable candidate for a public safety position with the

City of Medford.”. The Appellant objected to Exhibit 6. Although this exhibit is admitted as a document relied on by HRD in the statutory bypass process, its weight and/or its authenticity as a business record generated/kept in the normal course of business will be considered in conjunction with other relevant evidence. It is noted that The Mayor is the Appointing Authority for The City of Medford and Chief Giliberti, the only witness for the City is not the keeper of the records for the Mayor. (Exhibit 6, Exhibits and testimony, administrative notice)

- 6) Chief Giliberti recommended to the Mayor that the Appellant be PAR.09 removed from the eligibility list. Chief Giliberti made this recommendation to the Mayor verbally, while sitting with the Mayor in the Mayor’s office in October, 2006. Chief Giliberti relied completely on his memory that the Appellant had failed a drug screening for the Medford Fire Department in 2001 and not based on any documentation he had available. (Testimony of Giliberti)
- 7) On April 20, 2007, by letter, HRD approved the reason listed for the Appellant’s PAR 9 removal and removed him from Certification #260552, the 2006 Medford eligible list, and Certification # 240228, the 2004 Medford eligible list. (Exhibit 7)
- 8) Although the bypass PAR.09 letter of March 7, 2007 apparently only had the single attachment relating to the Appellant, Chief Giliberti testified that another candidate was also PAR.09 removed and also had a separate attachment to that letter. Chief Giliberti first testified that he saw that other PAR.09 attachment in late 2006 or early 2007 on the Mayor’s desk. However, when questioned by this hearing officer; that he could not have seen it until March 7, 2007 or thereafter,

when it actually existed, Chief Giliberti then realized his mistake. He began to backtrack and equivocate in his testimony. (Testimony and demeanor of Giliberti)

- 9) The City offered a withdrawal slip addressed to the Mayor, signed by the Appellant on February 21, 2001, pertaining only to Certification No. 210059 (Exhibit 1) Chief Giliberti testified that he assumed that the Appellant's reason for withdrawal at that time was failing the drug screening. (Testimony of Giliberti)
- 10) However, the Appellant testified credibly that prior to being called for an interview or the Orientation in 2001, he went to the Medford Fire Department and told Chief Giliberti that he would be withdrawing his candidacy because he could not in all fairness leave his employer, Porter Engineering because the company was in the middle of a large construction project, for which the Appellant was the Project Engineer. He also had just been through a divorce in which he received custody of his two daughters. He did not attend the 2001 Orientation. (Testimony of Appellant)
- 11) Chief Giliberti testified that he could not recall whether he had a conversation with the Appellant regarding the filing of the withdrawal on February 21, 2001. Chief Giliberti also testified that he could not be sure whether he (the Chief) was at the March 30, 2004 Orientation where the hair sample was taken for drug testing. (Testimony of Giliberti)
- 12) The Appointing authority offered no reliable evidence of a drug screen (hair sample) administered to the Appellant, prior to March 30, 2004. (Exhibits and testimony)

13) The Appellant testified credibly that he did not have a drug screen administered to him prior to March 30, 2004 and that he did not attend the 2001 Orientation.

(Testimony of Appellant)

14) In 2001, the Appellant's name appeared tenth on the list to fill ten vacancies.

Chief Giliberti, who was Chief at the time of the 2001 Certification. The Chief testified that he remembered receiving notification from a drug testing company, possibly Psychemedics, that the Appellant had failed the 2001 drug screening.

However, he was unsure whether it was another company which then did the testing for the Department, which first began drug testing in the "late 1990's".

However, Chief Giliberti never made any attempt to contact Psychemedics or any other source to obtain records to support his claim that the Appellant was drug tested in 2001. (Testimony of Giliberti)

15) However, Chief Giliberti also initially asserted that he did not have those records with him. Then he claimed that the records of the drug screen results from 2001 have since been destroyed, as they routinely are after two to three years, and no other proof of the test results or the destroyed records or the policy of destroying these records after 2-3 years were offered. (Exhibits, Testimony of Giliberti)

16) Chief Giliberti described the 2001 Orientation as taking place at the Fire Department. He stated that the Appellant was present at that 2001 Orientation; the candidates signed-in, produced identification and were drug tested, (hair samples taken) at that Orientation. However, Chief Giliberti initially testified that he was not present at that Orientation. He offered no sign-in sheets, no affidavits from the Deputies in charge of the Orientation, drug-test results or other documentation to

prove the Appellant's presence at the 2001 Orientation and drug testing then.

Chief Giliberti later modified his testimony by stating that he was not sure whether he was present at the 2001 Orientation. (Exhibits, Testimony of Giliberti)

- 17) The Commission takes Administrative Notice of its unanimous decision in the case of Jeffrey King v. Medford Fire Department, G1-05-20, *allowed* dated September 28, 2006. In the King case, the Commission found that King was unfairly bypassed by the Medford Fire Department, of which Frank Giliberti was then Chief, so that his son might have a better chance at attaining the firefighter position. The Chief's son, who was tied for 28th on the 2001 eligibility list, yet he was appointed to one of the ten available positions, thereby bypassing others higher on the eligibility list. The Commission also found that the Chief played a large role and was the "point person" in determining who was selected from the list. (Administrative notice)
- 18) On March 11, 2004, the City requested another certification list to fill seven (7) vacancies and they received Certification No. 240228, on which the Appellant's name appears twelfth (12). (Testimony of Giliberti)
- 19) The Appellant signed willing to accept the appointment and attended the March 30, 2004 Orientation. (Exhibit 2, Testimony of Giliberti and Appellant) The 2004 Orientation was held at the fire station and two deputies were in charge of answering questions and taking hair samples. (Testimony of Giliberti) At that orientation, the Appellant states that a hair sample was taken to undergo a drug test, while Chief Giliberti was sitting next to him. The Appellant testified that the

nurse sat on his other side and took the hair sample. However, Chief Giliberti testified that he was not present at either Orientation. Chief Giliberti testified that he determined that the Appellant was present at both the 2001 and 2004 Orientations by looking at the “sign-in sheets”. However, Chief Giliberti did not bring those sign-in sheets with him to this hearing. (Testimony of Giliberti and Appellant)

20) It is highly unusual for someone in Chief Giliberti’s position to be present at the taking of the hair sample in 2004. He is the Department’s chief administrative officer and intimately involved in the impartial selection/bypass/removal process. The hair sample taking is part of the overall medical examination of candidates, at the Orientation. This is an independent, medical or scientific process performed by a neutral party dependant upon chain of custody and avoidance of taint or contamination to be properly collected. The Chief should have realized this circumstance and avoided contact entirely while the medical process was being performed. (Exhibits and testimony, reasonable inferences)

21) Chief Giliberti testified that the Orientation medical examination is performed by a “medical facility” that “we contract for” to do the drug screening. The two Deputies are in charge of explaining the process and directing the process for the candidates at the Orientation. The medical examination/ hair samples had been done by a company, “Occupational Health and Rehabilitation in Wilmington”, now called “Concentra”. He is not sure about the medical examinations being contracted out to individual nurses. His memory at that point was refreshed by the

City's Attorney interjecting and directing his attention to Exhibit 2 and the name of a company "Psychemedics". (Exhibit 2 and testimony of Giliberti)

22) Chief Giliberti testified in a slow deliberate manner. His responses became slower, halting, and more deliberate and more qualified when cross-examined or inquired from by this hearing officer. A response prefaced with "I think ..." or "I believe ..." became routine. His memory appears to be selective. He testified at one point from notes he read. He was specifically asked by this hearing officer why he had not collected or attempted to collect the various documents he had seen and referred to (e.g. sign-in sheets, other PAR.09 letter attachment, 2001 drug test) in his testimony, in preparation for this hearing. He had no answer for this omission, other than he didn't think he had to. (Testimony and demeanor of Giliberti)

23) The City offered a document reporting on April 7, 2004 purporting that "Psychemedics", a California based corporation, found that a hair sample purporting to be the Appellant's, tested positive for marijuana. However, the Appellant is not named and only numbers are used for identification. The document does not define or explain "Mass. Spec Positive" or "Mass Spec cutoff" relating to alleged amount/concentration of marijuana found. The City offered no other evidence to substantiate or explain this document. (Exhibit 2, Exhibits and testimony)

24) The Appellant has not smoked marijuana "since he was a kid", at least 20 years earlier and does not know how the drug screen came back positive, but mentioned that, at the time, there were "a lot of problems with people being taken off the

list". He thought "something was up" and "maybe they [the samples] were switched". (Testimony of Appellant)

25) Chief Giliberti testified that on April 26, 2004, he informed the Appellant that he had "failed" the drug test from the hair sample taken on March 30, 2004.

(Testimony of Giliberti)

26) The Appellant upon hearing that from the Chief on April 26, 2004, stated to the Chief that "such a result was not possible" since he did not smoke anything, lawful or unlawful. (Testimony of Appellant)

27) The Appellant then asked the Chief for a copy of the test results. The chief responded that he could not provide a copy then but would forward a copy to him later on. The Appellant never received a copy of the drug test from the Chief.

(Testimony of Appellant)

28) The Appellant testified that the Chief telephoned him on his personal cellular telephone and asked him to come into the Chief's office. He went to the Chief's office on April 26, 2004. The Chief explained to him that the best course of action for him to take was to sign a withdrawal but that he would remain on the eligibility list. The Chief did not show him the drug test results or any other documentation. The Appellant signed the prepared withdrawal letter for his candidacy for the Medford firefighter position on Certification No. 240228, expecting that it was the best course of action and that he would remain on the eligibility list. (Testimony of Appellant, Exhibit 3)

29) The Chief's son and the sons of two senior firefighters appeared on the list below the Appellant and received Chief Giliberti's recommendation for appointment that

- year. These three were the only 3 non-veterans to be selected out of 10 selected for the 10 vacancies. (See King, *supra*, page 4 and page 8.)
- 30) On or about May 3, 2006 the City made a requisition to HRD for a certified eligibility list to fill (6) six firefighter positions. (Exhibit 4)
- 31) On June 2, 2006, HRD issued Certification # 260552 to the City, pursuant to that requisition. The appellant's name appeared on the certification in the 8th position. (Exhibit 5)
- 32) The Appellant received a card from HRD, dated June 2, 2006 to go in person to Medford and sign if he was willing to accept appointment. The Appellant did go and sign the certification, that he was willing to accept appointment. (Exhibits 5 & 10, testimony of appellant)
- 33) By the end of September or beginning of October, 2006, the Appellant had not heard from or receive anything from the City. He then began telephoning the Chief and left two messages for him. The Chief did not return his calls. He next called the Mayor twice and left messages but received no return calls. He then telephoned HRD and spoke directly with Richard Currier. Mr. Currier told him he would "look into the matter". Sometime after that he did receive a letter from HRD. (Testimony of Appellant)
- 34) On March 9, 2007, the City sent a written letter to HRD with its named selected candidates and a request to PAR.09 remove the Appellant from the certification, thereby bypassing him for appointment. (Exhibit 6)
- 35) On April 20, 2007 HRD approved the PAR.09 removal of the Appellant from the certified eligibility list.(Exhibit 7)

36) The Appellant, John Sailor is neat in appearance and appropriate in his presentation and demeanor. He made good eye contact and answered questions directly and without hesitation. He did not embellish, eliminate unfavorable or add favorable testimony. He displayed a clear memory, supported by detail and facts that rang true. He did not appear to testify with any attitude or motive other than to describe accurately what had occurred. I find him to be a credible and reliable witness. (Exhibits, testimony and demeanor of Appellant)

37) Chief Giliberti is neat and professional in appearance. He appeared and testified in uniform. However, his actions and inactions during the Appellant's several application processes resulting in the Appellant's several bypasses and/or PAR.09 removal from the eligibility list displayed other characteristics. The Chief made no real effort to accurately determine fundamental facts surrounding these several bypasses. He relied entirely on his memory to recommend the PAR.09 removal to the Mayor, based substantially on the alleged positive 2001 drug screening. His testimony eventually showed inconsistency, contradiction and improbability. It is not reasonable, in a business sense for a person in such an important position to consistently avoid reference to written records to corroborate and refresh his memory of years old events. He made no attempt to even determine if Psychemedics or any other company had actually performed the alleged 2001 drug screening. He could not even show that another candidate had been PAR.09 removed from the same eligibility list. Yet he claimed it in his testimony based on his memory of having seen it on the Mayor's desk, at a time it could not yet exist. The other areas of concern regarding the Chief's testimony have been described in

separate findings above. Chief Giliberti's testimony is found to be inaccurate and unreliable. (Exhibits, testimony and demeanor of Giliberti)

CONCLUSION

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 v. Civil Serv. Com'n., 43 Mass. App. Ct. 300, 304 (1997). 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. Commissioners of Civil Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 214 (1971). Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). 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. Civ. Serv. Com'n., 31 Mass. App. Ct. 315 (1991). See G.L. c. 31, § 43.

Appointing Authorities are expected to use sound discretion when choosing individuals from a certified list of eligible candidates on a civil service list. However, the Appointing Authority may not be required to appoint any person to a vacant post. "He may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment. See Commissioner of the Metropolitan Dist. Com'n. v. Director of Civil Serv. 348 Mass. 184, 187-93 (1964). See also Starr v. Bd. of

Health of Clinton, 356 Mass. 426, 430-431 (1969); Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Corliss v. Civil Serv. Com'r, 242 Mass. 61, 65 (1922). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-72 (1940). A judicial judgment should "not be substituted for that of . . . [a] public officer who acts in good faith in the performance of a duty". See Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660, 666, (1971); M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-72 (1952). 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 Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003); Commissioners of Civil Serv. v. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975). However, 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, 43 Mass. App. Ct. at 304.

At the outset, the Commission takes Administrative Notice of its unanimous decision in the case of Jeffrey King v. Medford Fire Department, G1-05-20 dated September 28, 2006. In the King case, the Commission found that King was unfairly bypassed by the Medford Fire Department, of which Frank Giliberti was Chief, so that his son might have a better chance at attaining the position. The Chief's son, who was tied for 28th on the 2001 eligibility list, was appointed to one of the ten available

positions. The Commission also found that the Chief played a large role and was the “point person” in determining who was selected from the list.

In the present case, we must decide whether the Appointing Authority had just cause for bypassing the Appellant by removing his name from the 2007 certification list due to his alleged failure of two drug screenings in conjunction with the 2001 and 2004 certification lists. While failing two drug screenings is an acceptable reason for bypass, it is not clearly established that the Appellant ever did fail a drug screening.

The 2001 certification list, which contained the name of the Chief’s son, was the same list on which the Appellant appeared tenth. There was no proof other than the testimony of Chief Giliberti, who had a vested interest in removing candidates from that list, that the Appellant ever attended the orientation or failed the drug screen in 2001. The Appellant stated that his reason for not accepting the position was out of loyalty to his company – he wanted to finish the project he was working on before leaving. The Appellant was a credible and sincere witness and the Respondent’s contention that he failed the 2001 drug screen cannot be accepted without sufficient evidence.

The Appellant’s name appeared eighth on the 2004 certification list for six available spots. On this list, two individuals recommended by the Chief appeared lower than the Appellant and were the non-veteran sons of senior firefighters at the Medford Fire Department. (See King, page 4 and 8.) The Appellant did attend the orientation for this certification list and had a hair sample taken. Chief Giliberti was present at the time the hair sample was taken and called him a few weeks after the sample was taken. The Chief met with the Appellant in his office and told him that he had failed the drug screen. The Appellant never saw the results, as Chief Giliberti did not have the paperwork to

show him. The Chief also said that if the Appellant signed a withdrawal, his name would be kept on the list. The Appellant thought it would be in his best interest to sign the withdrawal and wait until the next certification to be appointed. By accepting this offer and relying on the word of the Chief, the Appellant did not have an opportunity to challenge the results of the test or the chain of custody of the sample. When asked during the hearing about how the results came back positive, the Appellant said that he has not smoked marijuana “since he was a kid” (approx. 20 years ago) and does not know how the drug screen came back positive. He mentioned that, at the time, there were “a lot of problems with people being taken off the list” and thought “something was up” and “maybe they [the samples] were switched”.

In addition to the hazy facts surrounding the drug screenings and appointments for those two certifications, it is curious that the Department waited the length of time it did before removing the Appellant’s name. According to Chief Giliberti’s testimony, the Department has never hired someone who has failed a drug test and they certainly would not hire someone within two years of failing one. When asked if the Department would ever hire someone who failed a drug screen, Chief Giliberti said, “Two years, I don’t think that’s long enough, maybe 5, maybe 10...” However, after the Appellant allegedly failed the two drug tests, it took the Department six years after failing the first one and three years after failing the second one for them to remove his name from the list. It is also odd that they would consider the Appellant only three years after failing the first screen, which they did when they invited him to the 2004 Orientation.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages

Control Com'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); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility). Here, there are two very different versions of what happened regarding the Appellant's bypass and prior withdrawals and only one of these versions can be believed. The overtones of personal interest on the part of Chief Giliberti on behalf of his son and sons of other senior firefighters are overwhelming. The Chief chose to rely on his memory of year's old alleged observations instead of documentation that should have been generated and kept in the normal course of business. Since the Chief had some personal interest in the outcome he should have kept a distance from the selection process, including the record keeping for it. The Chief is not the appointing authority, the Mayor is and the Mayor's office or the record keeper for the Mayor should have testified in this matter and produced documentation related to the selection process. Given the facts in the King case, which involved the same certification list as the one the Appellant was considered for, and the role that Chief Giliberti played in the unfair bypass of other candidates on that list, the Appellant appeared to be a more credible witness. This is bolstered by the fact that the Appellant was believable, unhesitant, had a good memory for details but did not embellish the facts, and the fact that he was granted custody of his two minor daughters by the court, which tends to show that he is a responsible person and not a drug user. When taking all of these facts into consideration,

the Appointing Authority did not show sound and sufficient reasons by a preponderance of the credible evidence in the record, to justify bypassing and/or removing him from the eligibility list for appointment as a firefighter in the Medford Fire Department.

For all of the above reasons, the appeal under Docket No. G1-07-441 is hereby *allowed*.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that name of the Appellant, John Sailor, be placed at the top of the eligibility list for original appointment to the position of permanent full time firefighter, so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of permanent full time firefighter in the City of Medford Fire Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a Medford firefighter. The Appointing Authority may not use the same reasons for bypass or removal as used in the present appeal. The Commission further directs that, if and when John Sailor is selected for appointment and commences employment as a Medford firefighter, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification # 260552.

Civil Service Commission,



Daniel M. Henderson
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman No, Henderson Yes, Marquis No, Stein Yes, and Taylor Yes, Commissioners on December 10, 2009)

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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:

Frank McGee, Atty.. (Appellant)

Mark Rumley, Solicitor. (City of Medford)

John Marra, Atty. HRD

COMMONWEALTH OF MASSACHUSETTS

**SUFFOLK, ss.
COMMISSION**

CIVIL SERVICE

**One Ashburton Place: Room 503
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**JOHN SAILOR,
Appellant,
v.
CITY OF MEDFORD,
Respondent.**

CSC Case No: G1-07-188

OPINION OF COMMISSIONER STEIN CONCURRING IN RESULT

I concur in the conclusion that the preponderance of the credible evidence presented through the testimony of witnesses and exhibits, and the findings of Commissioner Henderson, the City of Medford failed to meet its burden to prove “sound and sufficient” reasons for bypassing the Appellant, John Sailor, and for taking the even more drastic step (apparently without his knowledge and in direct contradiction to what he had been lead to believe by Fire Chief Gilberti) to request that the Massachusetts Human Resources Division (HRD) order his name be removed from the eligible list for appointment as a Firefighter. I would not want the decision here to suggest that the Commission will treat any properly documented proof that a candidate for firefighter has tested positive for unlawful drugs as insufficient grounds for such actions. What distinguished this case, however, is the wholly inadequate, and inexcusable deficiencies in the evidence that the City of Medford produced, which lacks even a rudimentary foundation upon which the Commission could rely to accept as true the allegations against the Appellant. For example, despite the opportunity to do so, the City could produce results of only one of the two drug tests it claimed the Appellant failed and even that test result lacked the necessary supporting documentation and could not credibly be

tied to the Appellant. On a proper evidentiary record, the Commission has consistently acted, and I trust will continue to act appropriately, to endure the citizens of the Commonwealth have the drug-free fire force to which they are entitled.

Paul M. Stein

Commissioner