

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

PHILIP SALIBA,
Appellant

v.

CITY OF WORCESTER,
Respondent

G1-14-91

Appearance for Appellant:

Allyson Hope Cohen, Esq.
Cohen Law Services, LLC
8 Lyman Street, Suite 200
Westborough, MA 01581

Appearance for Respondent:

William R. Bagley Jr., Esq.
455 Main Street, Room 109
Worcester, MA 01604

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

On April 8, 2014, the Appellant, Philip Saliba (“Appellant”), pursuant to G.L. c. 31, s. 2(b) filed a timely appeal with the Civil Service Commission (“Commission”), claiming that the City of Worcester (“Respondent”) did not have reasonable justification to bypass him for the position of full-time firefighter with the City of Worcester Fire Department (“WFD”).

The Commission held a prehearing conference on April 29, 2014. I held three (3) days of hearing on August 19, 2014, October 29, 2014, and January 8, 2015 in Worcester.² All witnesses, with the exception of the Appellant, were sequestered. WFD Division Chief Dolan

¹ The Commission acknowledges the assistance of Michael Chin, Esq., in the drafting of this decision.

² 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.

was the Respondent's first witness and he was permitted to remain at the hearing to advise Respondent's counsel as the Respondent's representative thereafter.

The full hearing was digitally recorded.³ In addition, an official court reporter recorded the hearing and produced transcripts of the record. Both parties subsequently submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Based upon the fifty-five (55) exhibits⁴ entered into evidence, the stipulation of the parties, and the testimony of:

Called by the Respondent:

- District Chief Dennis Dolan, WFD;
- Captain Matthew Braley, WFD;
- Captain Andrew White, WFD;
- Lieutenant Patrick Moran, WFD;
- Firefighter Harold Rodriguez, WFD;
- Kathleen G. Johnson, Assistant City Manager⁵ and Human Resource Director for the City of Worcester⁶;
- Nina Galica, Coordinator of Employment in the City of Worcester Human Resources Department; and

Called by the Appellant:

³ 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 he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. Although the Commission recorded the hearings in this case, the parties engaged a stenographer who recorded and transcribed the recordings of the proceedings and agreed that the stenographer's recordings and transcriptions would constitute the official record of the hearings.

⁴ The numbering of the exhibits is not completely sequential since the parties offered certain documents which they had already numbered. The numbered exhibits are: 1 through 16, 16i, 16ii, 16iii, 16iv, 17 through 24, 27 through 29, 29i, 30, 31, 31i, 32 through 39, 42 through 46, 48 through 50, 52, and 54 through 56. This includes the correspondence between counsel regarding the Appellant's request pertaining to polygraph information.

⁵ The City Manager changed during the hiring process involved here.

⁶ Ms. Johnson supervises Attorney Bagley, who represented the Respondent here.

- Philip Saliba;

and taking administrative notice of all matters filed in the case, including, without limitation, post-hearing submissions of earlier correspondence between the parties' counsel, and pertinent statutes, regulations, case law and policies, and drawing reasonable inferences from the evidence I find credible, I make the following findings of fact:

1. The Appellant was born and raised in Worcester and graduated from high school there. While in school, the Appellant worked at Meineke Car Care. At the time of the Commission hearing in this case, the Appellant was thirty-three (33) years old. (Testimony of Appellant; Ex. 7)
2. The Appellant is a self-employed master plumber who lives in Worcester. He has been married for five years to his second wife and he has two children. (Testimony of Saliba; Ex. 7)
3. The Appellant served in the U.S. Marines from September 1999 to March 2007, including three (3) tours of duty in Iraq. He was honorably discharged with a hardship relating to his mother's fatal disease. He achieved the rank of Platoon Sergeant and was an Unmanned Aerial Vehicle Pilot and Instructor. (Testimony of Appellant; Ex. 35) The Appellant attended military leadership courses and received a number of awards in recognition of his service. Military reports state, in part,

“... This is a combat report. MRO was under hostile indirect fire and in a leadership role directly coordinating actions and strike coordination missions in the immediate combat area during OIF [Operation Iraqi Freedom] 04-06 from 2005-50902 – 20060320.

... Strong Marine NCO. SNM did a phenomenal job of leading the Marines in the operations department. He conscientiously accomplished the mission while taking care of his Marines. Daily, MRO provided sound aviation guidance to the 2230-0330 UAV flight crew, balancing the special requirements and limitations

of several junior aircrew on this shift. His leadership presence provided a critical risk mitigator enabling safe and effective operations. ...”

“-Flew over 120 combat sorties and over 550 hours in support of OIF 04-06.
-Managed several work crews and made major work center and COC construction improvements during OIF 04-06
-Instructed 11 internal pilots and 3 internal pilot instructors.
-Managed the daily accountability and operations of 29 Operations Marines.
96.3% of his section passed the PFT with a first class score.
-Managed Operational duties, assignments, and billets”

“ ... as pioneer UAV internal operator for Marine Unmanned Aerial Vehicle Squadron ... Sergeant Saliba performed his duties in an exemplary and highly professional manner Because of his diligent efforts and unrelenting resourcefulness, he was respected and admired by all who observed him. Sergeant Saliba’s initiative, perseverance, and total dedication to duty reflected credit upon himself and were in keeping with the highest traditions of the Marine Corps and the United States Naval Service.”

(Exs. 4, 7)(*see also* Exs. 29 and 29i)

4. After serving in the military, the Appellant worked at Worcester County Refrigeration from April 2007 to December 2008, from which he was laid off. Since January 2008 to the time of the hearing in this case, the Appellant has owned and operated Central Mass Plumbing + Heating. (Exs. 4, 7)
5. The Appellant is a licensed master plumber, a licensed journeyman plumber, a licensed sheet metal worker, and he has an oil burner technician certificate. (Exs. 4, 7, 24)
6. In 2013, the Appellant took and passed the Civil Service firefighter examination. His name appeared on Certification #00993, ranked 6th in a tie group. The Appellant applied for a position at the WFD but was bypassed, giving rise to this appeal. (Administrative Notice) The Respondent hired twenty-eight (28) candidates, at least some of whom were ranked below the Appellant. (Testimony of White, Moran, Galica; Exs. 1 - 3; Administrative Notice)

7. Prior to his 2013 application to become a firefighter at WFD, the Appellant applied to be a State Police Officer at the Connecticut State Police (“CSP”) in 2007 but he was not hired. In 2008, the Appellant applied to be a police officer at the WPD but he was bypassed; the Appellant did not appeal the 2008 WPD bypass to the Commission. In 2011, the Appellant applied to be a firefighter at WFD but he was bypassed; the Appellant appealed the 2011 WFD bypass to the Commission but subsequently withdrew the 2011 appeal. (Exs. 34, 36, 49, 54; Administrative Notice) The Respondent’s 2013 WFD bypass refers to the Appellant’s previous applications to the CSP in 2007, to the WPD in 2008 and to the WFD in 2011. Therefore, I first address those earlier applications.

Appellant’s Connecticut State Police (“CSP”) Application

8. As a part of the application process at the CSP, the Appellant was required to take a polygraph examination. A certified examiner for the CSP prepared a December 2007 internal memorandum, marked “Confidential”, regarding the Appellant’s polygraph examination stating, in part, that,

he had been in a number of fights beginning when he was in public school and in or about 2005 in Florida, when the Appellant was on leave from the military, when someone at a restaurant refused to return the Appellant’s camera, the Appellant was arrested but the charges were subsequently dropped;

the Appellant was involved in two (2) criminal matters as a juvenile;

while in the military in 2000, the Appellant was arrested for assault and repeated underage drinking, for which he was given “non-judicial punishment”, receiving a reduction in rank, restriction to base and extra duty;

while in the military, the Appellant was involved in a domestic dispute with his then-wife, which was the subject of military police involvement and no arrests;

at or about 25 years of age, the Appellant broke his laptop computer, filed a false insurance complaint that the computer was stolen and filed a false complaint with

Sutton Police Department, resulting in the Appellant's receipt of payment by the insurance company for the laptop⁷;

the Appellant reported being a "light/social drinker", drinking approximately 20 alcoholic beverages per month, that he operated a car twice when he consumed too much alcohol, last doing so in 2006; the last time he drank too much was in 2007;

the Appellant has a ten (10) percent military disability for hearing; at or around age 24 or 25, the Appellant used injectable testosterone on one occasion (for one cycle, approximately 2.5 months long);

the Appellant was "current" on all financial obligations; and

the Appellant "was cooperative throughout the interview and examination process."

(Exhibit 49)

9. The Appellant agrees that the CSP memorandum about the polygraph is accurate.

(Testimony of Appellant)

10. Following his discipline in 2000 in the military, the Appellant was promoted.

(Testimony of Appellant)

11. In 2006, the Florida State Attorney issued a written determination that he would not prosecute the Appellant. (Ex. 42)

12. By letter dated January 24, 2008, CSP Sergeant Kittle wrote to WPD Officer Lawrence,

In response to your recent inquiry, Mr. Philip D. Saliba was in our 2007 Selection Process. Mr. Saliba received an 87 out of a possible 100 on the written exam; passed the physical agility; and was sent for a polygraph examination. Mr. Saliba was notified that he would not be continuing further in our selection process.

I have enclosed a copy of the Personal History Report that Mr. Saliba completed for us and a copy of the polygraph report. If I can be of further assistance please contact my office at [CSP phone number].

(Ex. 48; *see also* Exs. 2, 32, 49; Administrative Notice)

⁷ There is no evidence here indicating that the Appellant was charged and prosecuted for the false insurance claim and, if not, the reason he was not charged and prosecuted.

Appellant's 2008 Worcester Police Department ("WPD") Application

13. The Appellant applied to be a police officer at the WPD in or about 2008. (Ex. 33)
14. The WPD, unlike the Worcester Fire Department ("WFD"), is a decree department⁸, requiring that the state Human Resources Division ("HRD") approve the reasons given by the appointing authority to bypass a candidate. (Administrative Notice)
15. The Appellant completed a WPD Personal History Statement form ("PHS") in 2008 and disclosed that he recently applied to be a CSP Officer. (Ex. 33; Administrative Notice)
However, the Appellant's 2008 WPD application is not in evidence. (Administrative Notice)
16. By facsimile dated January 23, 2008 sent by the WPD to Connecticut Police Officer Lawrence, the WPD requested, "...copies of Mr. Saliba's employment application, your findings, as well as the results of his polygraph test. Enclosed herein is a signed, notarized consent and authorization release form" (Exs. 31 and 31i)
17. In a February 12, 2008 report from Police Chief Gemme to then-City Manager O'Brien, Chief Gemme wrote, in part, that,
 - the Appellant had very positive personal and employment references;
 - the Appellant has a good credit history;
 - the Appellant received an Honorable Discharge from the Marines in 2007 and filed for a hardship release when his mother was diagnosed with cancer. "Saliba returned home to take care of her and be with her."
 - a check of the Interstate Identification Index ("III") indicated that the Appellant was arrested in Florida in 2006 for assault when he punched another man for not

⁸ A "consent decree community", under the so-called Castro Decree issued by a federal court, involving the appointment of Police Officers, requires that preference in such hiring be given to certain minority candidates and also requires that the state's Human Resources Division ("HRD") review and approve bypass reasons offered by appointing authorities.

returning the Appellant's camera to him but that the charges were dropped and the Appellant was not prosecuted;⁹

the Appellant was charged with criminal offenses as a juvenile, which charges were continued without a finding;

in 2008, the Appellant was bypassed for appointment to the CSP "as a result of his polygraph examination."

The Appellant stated in his PHS that he used marijuana between ages 15 and 16 but he told the CSP that he used marijuana sixty times between the ages of 15 and 26;

at the beginning of his interview, the Appellant added to his PHS, as candidates are allowed to, adding that he used anabolic steroids for one cycle in 2003-2004¹⁰;

the Appellant stated to WPD that he is a "social drinker who has 2-3 drinks occasionally". However, the Appellant told CSP that he had "been drunk on at least 15 occasions during the past twelve months."

the Appellant wrote on his PHS that he has "never" driven while intoxicated and yet he told CSP that he had driven while intoxicated in 2006 after having had six (6) drinks in two (2) hours although there is no indication that the Appellant was stopped, arrested, charged and prosecuted for an OUI;

the Appellant was disciplined in the military for underage drinking and stated that he was an "angry drunk";

the Appellant "was involved in three domestic incidents with his ex-wife" in California during his military service for which he received counselling, although there were no arrests or reports in these regards.¹¹

"Candidate wanted to conclude his interview by saying, 'I know I can not change my past, but since my incident in Florida, I have realized my behavior and lifestyle needed to change. I have not put myself in that position since that incident.'"

(Ex. 33; Administrative Notice)

⁹ The Police Chief's letter incorrectly states that the Appellant's arrest in Florida occurred in 2008 but it occurred in 2006. (Ex. 56)

¹⁰ This is the usage that the Appellant indicated in the CSP polygraph.

¹¹ While the Appellant acknowledges he had domestic disputes (plural) with his first wife, there is no indication where the Respondent obtained information indicating that there were three such disputes.

18. Although it is uncontested that the Respondent bypassed the Appellant for appointment to the position of police officer in 2008, the bypass letter (which would have required HRD approval) sent to the Appellant is not in evidence. (Ex. 3) However, by letter dated August 1, 2008, Kathleen G. Johnson, then-Worcester Acting Director of Human Resources¹² wrote to HRD asking to bypass the Appellant stating, in part,

the Appellant was involved in two (2) criminal matters as a juvenile and provided information thereon;

at or about 25 years of age, the Appellant broke his laptop computer, filed a false insurance complaint that the computer was stolen and filed a false complaint with Sutton Police Department, resulting in the Appellant's receipt of payment by the insurance company for the laptop;

in or about 2006 when the Appellant was in the military, he punched someone at a restaurant in Florida after the person refused to return the Appellant's camera. The Appellant was arrested but the charges were not prosecuted (nolle prosequi);

while in the military and living in San Bernardino, California, "was involved in three domestic incidents with his ex-wife ... He tried to conceal this information during the background investigation. When confronted with this information by the WPD Officers, the candidate readily admitted that was true. Candidate explained that early in the marriage he and his [first] wife were having money problems which resulted in verbal arguments. On one such occasion, candidate admitted physically placing his hands on his ex-wife in order to remove her from a doorway which she was blocking, not allowing him to exit. There were a total of three incidents of domestic arguments which the San Bernardino Sheriffs (sic) Department responded. No arrests or reports where (sic) made, and the jurisdiction was turned over to the Military Police. Candidate was directed to attend Domestic Violence counseling sessions."

"... During the course of this investigation, it was learned that the candidate had applied for a position with the Connecticut State Police. After requesting and receiving results of that interview and statements made by the candidate during that process, discrepancies were noted in several areas. The background investigators believed that the candidate was purposely being deceitful by withholding pertinent information regarding his background. He not only withheld information on his application but was also inconsistent and deceptive in his response when compared to his responses to the Connecticut State Police. ..."

¹² The Worcester City Manager is the Appointing Authority. Therefore, the letter to HRD and a letter sent by Worcester to the Appellant in these regards should have been sent by the City Manager.

“On the required written personal history questionnaire submitted to WPD, this candidate admitted of [sic] being involved in the following illegal activities:

- Admitted to using marijuana between the ages of 15 to 26 years of age.
- Admitted to possessing and using anabolic steroids for one cycle during 2003-2004.
- Admitted to driving under the influence of alcohol. ...
- Admitted to being charged with underage drinking while in the military. ...”

(Ex. 54)

Although Ms. Johnson’s letter states that the Appellant “admitted to” the listed “illegal activities” in his PHS, as the Respondent notes in stating that the Appellant withheld certain information, his use of marijuana from the age of 15 to 26 and his driving while intoxicated appeared in the CSP polygraph and not his PHS. (Ex. 49)

19. Since the Appellant’s 2008 WPD application is not in evidence, it is unknown whether the Appellant disclosed this information therein. (Administrative Notice)

Appellant’s 2011 Worcester Fire Department (“WFD”) Application

20. The Appellant applied to be a firefighter at the WFD in 2011. (Ex. 35)

21. The 2011 PHS form states, in part,

I UNDERSTAND THAT WILLFULLY WITHHOLDING INFORMATION OR MAKING FALSE STATEMENTS ON THIS FORM OR DURING MY APPLICANT INTERVIEW WILL BE A BASIS, BY ITSELF FOR REJECTION OR DISMISSAL.

... I AGREE TO THESE CONDITIONS AND I HERBY VERIFY THAT ALL STATEMENTS MADE HEREIN ARE TRUE AND COMPLETE.

(Ex. 35)(emphasis in original)

22. The 2011 PHS form does not state, as required by G.L. c. 149, s. 19B,

"It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability."

(Id.)

23. Item 12 of the Appellant's 2011 PHS asks, "Have you previously submitted an application or taken a civil service examination for employment with a police or fire department?" The Appellant responded "yes", and stated that he had applied to CSP to be a State Police Officer in 2008, to WPD in 2008 and to the Massachusetts State Police in 2011. (Ex. 35)

24. Item 32 of the Appellant's 2011 PHS asks, "Have you ever been arrested for DUI (Driving Under Influence)? The Appellant responded "no". (Ex. 35) There is no other item in the PHS that inquires about the applicant's use of alcohol or about drug use. (Administrative Notice)

25. Item 34 of the 2011 PHS states, "List all moving violations you have been stopped for while driving a vehicle." (Ex. 35) The Appellant responded,

"Texas – 2001 – Speeding
MA – 2006 – Speeding"
(Id.)

The Appellant also disclosed that the Appellant had driver violations before the age of twenty-one (21). (Id.)

26. Item 39 of the 2011 PHS states, "list all Captain's Masts, Court Marshall's [sic] or any other disciplinary actions taken against you while in the military service. Give date and details." (Ex. 35) The Appellant responded,

"2001 – NJP Underage Drinking + Assault – reduction in rank
2002 – marriage counseling for Domestic disputes
1st marriage, never charged or convicted"
(Id.)

27. Item 46 of the 2011 PHS asks, "Were you ever dismissed from a school or was any disciplinary action taken against you while you were in school? ... If yes, give details." (Ex. 35) The Appellant responded,

“Suspension from fighting – 3 times
was expelled from Worc Voke Shop due to tardiness.”
(Id.)

The Appellant subsequently graduated from high school in 1999. (Id.)

28. Item 55 of the 2011 PHS asks, “[h]ave you ever been convicted of a criminal offense? ...

NOTE: You may answer no if: A. You have been arrested but never convicted of a criminal offense B. You have been tried but never convicted for (sic) a criminal offense”. The Appellant wrote “yes” and described a juvenile criminal matter, providing the date, location, charges and result. (Id.)

29. By memorandum dated November 4, 2011 from Fire Chief to then-City Manager O’Brien, Fire Chief Dio wrote that the Appellant was an “unacceptable” candidate stating, in part, that,

the Appellant had “no record” in the Probation database;

the Appellant served effectively in the Marines from 1999 to 2007, although he appeared to have missed out on a promotion, received military discipline for underage drinking and counseling for domestic disputes with his first wife; he received a “hardship discharge” due to his mother’s serious illness;

the Appellant’s driving history indicates that on 6/14/2008 the Appellant was cited for a lane violation and speeding and that he had driving citations before the age of twenty-one (21);

the Appellant is self-employed as a successful plumber and has a favorable client reference;

an employer reference stated that he “was impressed with this candidate’s confidence and self-assurance. They hired him and found him to be a steady, consistent performer who needed minimal supervision.”

the Appellant’s neighbor reported that he has seen the Appellant “working around the house, always fixing things. Mr. Saliba has a good reputation in the community and the [neighbor] sees him as a skillful, self-motivated, all around nice guy.”

The Appellant's second marriage "has worked out well and he appears to be a good neighbor and family man."

At his interview, the Appellant mentioned his application to CSP and it appeared that the Appellant was bypassed at CSP due to a polygraph examination during which the Appellant mentioned his one cycle use of anabolic steroids. The Appellant also stated that "since he has been bypassed by the Worcester Police Department, he knew we had access to all the information he shared with us. This information made me question his honesty." As a result, Fire Chief Dio contacted the WPD and obtained information from the WPD's 2008 background investigation, including:

in 2006, the Appellant filed a false police report at the Sutton Police Department,

earlier in 2006, the Appellant was arrested in Florida for aggravated assault, although the charges were been dropped, and

the Appellant "has been involved in adverse situations involving alcohol and admits to having driven a motor vehicle while under the influence of alcohol. He refers to himself as an 'angry drunk.'"

(Ex. 34)

30. Although the bypass letter sent to the Appellant by the Respondent regarding the Appellant's 2011 application to the WFD is not in the record, by letter dated March 30, 2012, then-Director of Human Resources, Ms. Johnson, informed then-City Manager O'Brien of the reasons for the "most recent selections and bypasses for Firefighter positions". (Ex. 36) With respect to the Appellant, Ms. Johnson wrote that he was bypassed, in part, for,

filing a false police report with the Sutton Police Department in 2006 and a false insurance claim for which the Appellant received payment from the insurer;

his arrest in 2006 in Florida for aggravated assault, although the charges were dropped;

underage drinking in 2001 while in the military, for which he was disciplined;

three (3) domestic incidents involving his ex-wife while in the military, to which the San Bernardino Sheriff's Department responded, although there were no arrests or reports thereon; the Appellant received counseling in this regard;

being bypassed for appointment to the CSP in 2007 “as a result of his polygraph examination.”

He was bypassed by the WPD in 2008 for withholding information disclosed in the CSP polygraph examination; and

he “admitted of (sic) being involved in the following criminal activities:

Candidate admitted that he possessed and used anabolic steroids for one cycle.

Candidate has been involved in adverse situations involving alcohol and admitted to have driven a motor vehicle while under the influence of alcohol. He refers to himself as an ‘angry drunk.’ ...”

(Id.)

Appellant’s 2013 WFD Application

31. On July 27, 2013, the Appellant received a PHS form to complete. The Appellant signed a form letter indicating that he received the PHS form, which form letter states, in part, “I hereby certify that all the information I supply in this Personal History Statement is true and complete. Further, I understand that ANY misstatements or omissions of facts will subject me to disqualification as a candidate, or dismissal from the Worcester Fire Department. ...” (Ex. 11)(emphasis in original)

32. The Appellant also signed a form, as he did with regard to his 2011 WFD application, stating,

“I UNDERSTAND THAT WILLFULLY WITHHOLDING INFORMATION OR MAKING FALSE STATEMENTS ON THIS FORM OR DURING MY APPLICANT INTERVIEW WILL BE A BASIS, BY ITSELF FOR REJECTION OR DISMISSAL. ...

... I AGREE TO THESE CONDITIONS AND I HERBY VERIFY THAT ALL STATEMENTS MADE HEREIN ARE TRUE AND COMPLETE.

(Ex. 7)(emphasis in original)

33. The Appellant also signed a “Background Information Request and Waiver” form. This form states, in part,

“... I further understand that the Worcester Fire Department shall conduct a check with any of my past employers, a criminal record check with the Criminal Offender Records Information Agency, the FBI, and the Massachusetts Board of Probation. I understand that my Medical and Military records shall be released to the investigators at their request. ...”

(Ex. 6)(emphasis added)

34. The Appellant also completed an Applicant Preliminary Questionnaire (“Preliminary Questionnaire”), which states, in part,

“NOTE: An applicant for employment with a sealed record on file with the Commissioner of Probation may answer ‘NO RECORD’ with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. In addition any applicant for employment may answer ‘NO RECORD’ with respect to prior arrests, court appearances and adjudications in all cases of delinquency, or as a child in need of services which did not result in a complaint transferred to the Superior court for criminal prosecution (See MGL c276,s100,s100c)”

(Ex. 5)(emphasis in original)

35. The Preliminary Questionnaire asks, in part, the following questions to which the Appellant answered “no”:

Question 6, “Are you currently on probation for driving while intoxicated or any other traffic offense?”

Question 9, “Have you been arrested/convicted for driving while intoxicated or driving under the influence of drugs within the past ten years?”

Question 10, “Have you ever been arrested/convicted of a felony?”

Question 11, “Have you ever been enrolled in a batterer’s program?”

Question 13, “Have you ever been arrested/convicted of a felony drug offense?”

Question 14, “Have you ever been arrested/convicted of a misdemeanor drug offense?”

(Ex. 5)

36. The Appellant completed the 2013 PHS form, which form appears to be the same PHS form he completed in his 2011 WFD application. (Exs. 4, 11).

37. The 2013 PHS form, like the 2011 PHS form, does not state, as required by G.L. c. 149, s. 19B,

"It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability."

(Id.)

38. In response to Item 12 of the Appellant's 2013 PHS question regarding the applicant's application for employment with other police or fire departments, the Appellant replied that he had applied for the CSP in 2007, the WPD in 2008 and the WFD in 2011 (not mentioning a 2011 application to the Massachusetts State Police, which he mentioned in his 2011 PHS to WFD). (Exs. 7, 35)

39. In response to Item 32 of the PHS, which asks if the candidate has been arrested for DUI, the Appellant responded "no", as he did in his 2011 PHS. (Exs. 7, 35) As in the 2011 PHS, there is no other item in the PHS that inquires about the applicant's use of alcohol or about drug use. (Administrative Notice)

40. In response to Item 34 of the PHS, which requires candidates to list all moving violations the candidate has been stopped for while driving, the Appellant wrote that he had a speeding ticket and lane violation in 2008 and violations before the age of twenty-one (21). (Ex. 7) In his 2011 PHS, the Appellant mentioned only a 2001 speeding ticket in Texas and a speeding ticket in Massachusetts in 2006. (Ex. 35)

41. In response to Item 39 of the PHS, which asks candidates to list all discipline while in the military, the Appellant wrote that on April 13, 2001, he was disciplined under Article 92 for failure to obey a lawful order and Article 128 for simple assault. In his 2011 PHS, the Appellant wrote that in 2001 he received nonjudicial punishment for underage drinking and assault (reduction in rank) and in 2002 he received marriage counseling for domestic disputes in his first marriage, for which he was not charged or convicted. (Ex. 35)
42. In response to Item 46 of the PHS, which asks if the candidate was subject to discipline in school, the Appellant wrote that he was suspended for fighting and expelled from Worcester Vocational school due to tardiness. (Ex. 7) The only difference from his 2011 PHS in this regard is that he indicated in 2011 that he had been suspended for fighting three (3) times. (Ex. 35)
43. In response to Item 55 of the PHS, which asks if the candidate has ever been convicted of a criminal offense (with the same instructions as in the 2011 PHS regarding criminal matters that need not be reported), the Appellant wrote “no”. In response to the same question in the 2011 PHS, the Appellant answered “yes” and provided information about a juvenile matter. (Ex. 35)
44. Firefighter Rodriguez was assigned to conduct an investigation of the Appellant’s background and prepare a report to be given to members of the WFD who would be assigned to interview the Appellant. (Testimony of Rodriguez).
45. Mr. Rodriguez’s report states, in part, that,
- the Appellant was bypassed for employment by the CSP as a result of his polygraph examination, that WPD bypassed the Appellant in 2008 based on the Appellant’s criminal history, anger, alcohol use and for withholding information related to those issues;
- the Appellant has highly positive neighborhood and employment references;

the Appellant has certificates, awards and commendations and did a phenomenal job of leading when they were under hostile indirect fire;

the Appellant was court martialed while in the military in 2001 for underage drinking and assault and court martialed again in 2002 for domestic disputes, although he was not charged or convicted;

on the Appellant's PHS, he answered that he had no criminal history in this PHS but he did in the 2011 PHS (and the report here describes the juvenile criminal matter);

the Appellant has driver violations before the age of twenty-one (21) here and on his 2011 PHS the Appellant mentioned that he had licenses in Florida and California, which he may no longer have;

regarding CORI, "no Available Cori";

under skills and abilities: mechanical aspects, electrical hydraulics, and structural workings of buildings and equipment, "works extremely well under pressure"; and

the Appellant has several professional licenses and has experience with heavy equipment.

(Ex. 9)

46. Mr. Rodriguez wrote on his report that interviewers should ask the Appellant about a number of these matters in his report, such as the Appellant's phenomenal performance under indirect fire in Iraq, his courts martial in the military, his drivers' licenses, what the Appellant understands about the job of a firefighter and what would be the Appellant's priority, plumbing or firefighting¹³. Mr. Rodriguez was unfamiliar with the differences between military courts martial and nonjudicial punishment. (Testimony of Rodriguez; Ex. 9) The Appellant was not court martialed in the military and there is no military

¹³ I understand the question about whether the Appellant would prioritize his plumbing business over his firefighting duties, if hired, to indicate that some firefighters have second jobs that they pursue when not working at the Fire Department and wanting to ensure that firefighters with second jobs will prioritize working at the Fire Department.

documentation in the record indicating that he was court martialed. (Testimony of Appellant; Administrative Notice)

47. On September 16, 2013, the WFD interviewed the Appellant. The interviewers were all long time members of the WFD: Firefighter Rodriguez, Lieutenant (“Lt.”) Moran, District Chief Dolan¹⁴, Captain (“Capt.”) White and Capt. Braley (“interviewers”). (Testimony of Rodriguez, Moran, Dolan, White and Braley) None of the interviewers were involved in the Appellant’s 2011 WFD application. This was their first involvement in the hiring decision-making process. Each interviewer completed a Graded Interview Worksheet (“Worksheet”) using a scale from 1 (poor) to 4 (excellent). (Exs. 19 – 23) The Worksheet indicated that the interviewers were to grade the candidates’ responses to eight (8) scenarios with respect to these “characteristics”: appearance – punctual, accountable, adaptable- flexible, assertive – innovative, good judgment, co-operative, communicates, diversity friendly, dependable-reliable, confident, stress resistant, mature, team oriented, honesty/integrity, motivated, organized, general attitude, work relationships, decisive, and commitment. (Exs. 19 – 23).
48. The interviewers asked the Appellant a number of questions, including questions concerning the polygraph exam he had taken. Chief Dolan, Capt. Braley, Capt. White and Lieut. Moran did not see the polygraph at the interview. (Testimony of Dolan, Braley, White and Moran) However, the Appellant saw the CSP polygraph exam memorandum at the interview and he was asked questions about it. (Testimony of Appellant¹⁵) Chief Dolan indicated that the polygraph information was obtained from the

¹⁴ Chief Dolan is head of the WFD Training Division. There are other Divisions headed by other Division Chiefs. The Division Chiefs answer to the Chief of the Worcester Fire Department. (Administrative Notice)

¹⁵ When the Appellant asserted that the interviewers had his polygraph information at the interview, he was shown a number of documents to see which one of them he had seen. Upon seeing the CSP polygraph exam memorandum,

2011 WFD hiring process. (Testimony of Dolan) The 2011 WFD hiring process included information from the 2008 WPD bypass of the Appellant, which references the polygraph, among other matters. (Administrative Notice)

49. While the interviewers assigned the Appellant's responses positive scores at the interview for characteristics like innovative, motivated, dependable and appearance, they assigned him lower scores for other characteristics. Four of the five interviewers assigned a "0" to the Appellant for accountability and the fifth assigned him a "1" therefor, writing and/or testifying that the Appellant did not take full responsibility for his actions relating to alcohol, anger and criminal matters, for example, and they wrote and/or testified that instead of taking responsibility for these matters, he blamed the polygraph for his bypasses. Three of the five interviewers assigned the Appellant a "0" for good judgment; the remaining two interviewers assigned him a "2". For honesty and integrity, two of the interviewers assigned the Appellant a "0", two assigned him a "1" and one assigned him a "2" but wrote "... Don't believe him." (Testimony of Rodriguez, Moran, Dolan, White and Braley; Exs. 19 – 23)

50. One of the eight (8) scenario questions the interviewers asked the Appellant states,

"You are assigned to a station and a senior firefighter shows you around. He makes you feel welcome and comfortable in your new job. As the weeks go by he is becoming your friend as well. One evening you are sent to a fire in a retail store. Near the end of the fire you see your senior firefighter pick something small up and put it in his pocket. What do you do and why?"

51. The Appellant responded to this scenario by stating that he would not "back stab" the senior firefighter by reporting his actions. (Testimony of Rodriguez, Moran, Dolan, White and Braley; Ex. 22)

Ex. 42, he exclaimed excitedly that it was the document he had seen at his interview. Given the nature and context of the Appellant's response, I find these statements credible.

52. Another question asked of the Appellant was whether the Appellant would disclose the criminal, anger and alcohol matters if he did not take the CSP polygraph examination. The Appellant answered that, honestly, he would not. (Testimony of Rodriguez, Moran, Dolan, White, Braley and Appellant; Exs. 3, 21 – 23)
53. At the interview, the Appellant was asked if, apparently as a result of a military experience in Iraq, the Appellant has Post Traumatic Stress Disorder (“PTSD”). The Appellant answered that he does. (Testimony of Appellant and Braley)
54. On October 24, 2013, District Chief Dolan and Fire Chief Dio signed a document regarding the Appellant’s candidacy. The document lists the positions for which the Appellant was previously bypassed and states that the Appellant blames his bypasses on the polygraph examination and complains that it is unfair of the Respondent to rely on the information from the polygraph since other applicants do not have to take one. The document states that the Appellant has a speeding violation in 2008 and lists the Appellant’s traffic violations when he was a juvenile. (Ex. 3)
55. With regard to the criminal background check on the Appellant, the October 24, 2013 document indicates,

“Worcester Fire Department’s Candidate Investigation Unit did a Massachusetts CORI check on Candidate Saliba. However, ‘the level’ of access allowed to our Investigators for a Municipal Fire Department hire does not allow us enough information to verify whether or not the Candidate is suitable for hire based on their criminal history. Our request for a ‘Level 1’ CORI on Saliba came back as No CORI available.”

(Ex. 3)

The Respondent’s investigators visited the Worcester Court and WPD to obtain additional information about the Appellant and the other candidates prior to the interviews because apparently requests for the candidates’ CORI indicated

there were no such records. (Testimony of Rodriguez)

56. The October 24, 2013 document indicates that previous background investigations show,

in part, that,

in 2006, the Appellant filed a false police report and a false insurance claim for a computer and he was arrested for aggravated assault in Florida, although the charges were dropped;

the Appellant used anabolic steroids in 2003 - 2004;

the Appellant admitted to the WFD that he used marijuana between ages 15 and 16 but reported elsewhere that he used marijuana between the ages of 15 and 26;

the Appellant was disciplined for underage drinking in the military;

the Appellant was involved in three (3) domestic incidents with his ex-wife while in the military and living in California¹⁶;

the Appellant withheld information and/or failed to answer questions accurately;

the Appellant failed to take responsibility for his past actions;

at his interview, the Appellant stated that he would not reveal these matters if the WFD did not have the information from the polygraph;

at his interview, when asked “how he would deal with a fellow firefighter that he saw stealing, his response was that he ‘wouldn’t backstab’ the coworker.”

(Ex. 3)

57. By letter dated February 24, 2014, Human Resources Director Ms. Johnson wrote to City

Manager Augustus listing “the most recent selections and bypasses for Firefighter

positions ...” The reasons provided for bypassing the Appellant include,

the false police report and false insurance report that the Appellant filed about his laptop computer in 2006;

¹⁶ This document also alleges that the Appellant tried to conceal this from the Respondent. While the Appellant did not specify in his 2013 WFD application that one of his military disciplines involved domestic disputes, the Appellant included it in his 2011 WFD application. Since the Appellant’s 2008 WPD application is not in the record, it is unknown if the Appellant referenced the domestic disputes therein.

the Appellant was arrested for aggravated assault earlier in Florida in 2006 although the charges were dropped;

in 2001, the Appellant was disciplined in the military for underage drinking;

the Appellant “has been involved in adverse situations involving alcohol and admitted to have driven a motor vehicle while under the influence of alcohol. He refers to himself as an ‘angry drunk’.”

The Appellant was involved in three (3) domestic incidents with his ex-wife while in the military although no arrests or reports were made and the Appellant received counseling;

the Appellant was bypassed by the CSP as a result of his polygraph examination and withheld information in the polygraph while he was being considered for employment at the WPD;

at his interview, the Appellant stated that he would not have reported certain matters if the polygraph had not been disclosed; the Appellant also said, when asked how he would deal with a fellow firefighter he saw stealing that he would not ‘back stab’ the coworker.

(Ex. 2)

Nina Galica, Coordinator for Employment in the Respondent’s Human Resources office, drafted this letter for Ms. Johnson’s review and signing. Ms. Galica bases such letters on reports from the WFD. She does not question the information provided by the WFD.

(Testimony of Galica)

job applicants to take polygraph exams in Massachusetts. (Testimony of Johnson)

58. By another letter also dated February 24, 2014, Director of Human Resources, Ms.

Johnson, informed the Appellant that he had been bypassed and enclosed an excerpt of Ms. Johnson’s February 24, 2014 letter to the City Manager stating the reasons for the Appellant’s bypass. (Ex. 1)

59. The Respondent has hired candidates whom it previously bypassed. (Testimony of Dolan)

60. The Appellant thereafter filed a timely appeal of the Respondent's decision to bypass him. (Administrative Notice)

Applicable Law

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" includes, *inter alia*, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for a bypass are justified. Brackett v. Civil Serv. Comm'n., 447 Mass. 233, 241 (2006) Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971)(quoting Selectman of Wakefield v Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm'n., 78 Mass.App.Ct. 182, 189 (2010). "In its review, the commission is to find the

facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” *Id.* at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether 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.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly, at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... [employee] than in disciplining an existing tenured one.” *See* City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), (citing Beverly at 191). The appointing authority does not have to prove its valid justification is correct so long as it is supported by credible evidence. Beverly, at 187. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259. “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.* (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’n of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

When it comes to an applicant for a sensitive public safety position, “the Commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown...Absent proof that the [appointing authority] acted unreasonably...the commission is bound to defer to the [appointing authority’s] exercise of its judgment that ‘it was unwilling to bear the risk’ of hiring the candidate for such a sensitive position”. Beverly, at 190-91. *See also* Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010)(Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914, (2004)(rescript opinion); Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct., No. 2009-0290 (Memorandum of Decision dated February 10, 2010) reversing Anderson v. Department of Correction, 21 MCRS 647, 688 (2008). An appointing authority may bypass a candidate applying for a law enforcement position based on criminal charges even though the charges were ultimately dismissed. *See, e.g.* Cavaco v. Department of Correction, 27 MCSR 436.

Bypass appeals are governed by G.L. c. 31, § 27, which provides, in pertinent part:

... If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] ... the appointing authority shall immediately file ... a written statement of his reasons for appointing the person whose name was not highest....

Id.

With respect to criminal offender record information, G.L. c. 151B, s. 4(9) provides that “[i]t shall be an unlawful practice”,

“[f]or an employer ... to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the

following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection. ...”

(Id.)

The provisions of G.L. c. 151B, s. 4(9), enforced by the Massachusetts Commission Against Discrimination, apply to inquiries about sealed records or juvenile offenses. *See* MCAD and Hanson v. Mass. Dep’t of Social Services, 28 MDLR 42, 43 (2006)(full MCAD decision affirming that juvenile offenses fall within G.L. c. 151B, s. 4(9)).

Civil service law indicates that certain persons may not be appointed to civil service positions. Specifically, G.L. c. 31, s. 50 provides,

“No person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position, nor shall any person be appointed to or employed in any such position within one year after his conviction of any crime except that the appointing authority may, in its discretion, appoint or employ within such one-year period a person convicted of any of the following offenses: a violation of any provision of chapter ninety relating to motor vehicles which constitutes a misdemeanor or, any other offense for which the sole punishment imposed was (a) a fine of not more than one hundred dollars, (b) a sentence of imprisonment in a jail or house of correction for less than six months, with or without such fine, or (c) a sentence to any other penal institution under which the actual time served was less than six months, with or without such fine. Violations of statutes, ordinances, rules or regulations regulating the parking of motor vehicles shall not constitute offenses for purposes of this section.”

(Id.)

Pursuant to G.L. c. 151B, s. 4(16), it is unlawful for an employer to obtain medical information about a candidate for employment prior to making a conditional offer of employment. Specifically, the statute provides, in part,

An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.. ...”

Under G.L. c. 149, s. 19B(2), it is further “unlawful” for an employer to subject a candidate for employment, or request such a person “ ... to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against such person for the assertion of rights arising hereunder. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations.” Id. Section 19B(2)(a) provides further that, “[t]he fact that such lie detector test was to be, or was, administered outside the commonwealth for employment within the commonwealth shall not be a valid defense” Further, this statute requires that, “[a]ll applications for employment within the commonwealth shall contain the following notice which shall be in clearly legible print:

“It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.”
(G.L. c. 149, s. 19B(2))

Initial violations of this statute are punishable by a fine. Subsequent violations are further subject to a fine or imprisonment for not more than ninety days, or both. G.L. c. 149, s. 19B(3). Anyone aggrieved by a violation of subsection (2) of this statute may initiate a civil action for injunctive relief and damages, including treble damages for any loss of wages or other benefits, as well costs of litigation and attorney fees. G.L. c. 149, s. 19B(4). References to polygraph examinations in Commission decisions have been limited to disciplinary cases. To that end, the Appeals Court has ruled that a police department did not violate a police officer’s rights under

the polygraph statute by requiring him to take a polygraph exam in the course of an investigation to determine if the officer should be disciplined where the investigation involved allegations of criminal conduct, as opposed to violations of terms of employment. Furtado v. Town of Plymouth et al, 69 Mass.App.Ct. 319 (2007).

Parties' Arguments

The Appellant avers that the Respondent violated the Massachusetts polygraph law by obtaining information from the CSP about the Appellant's polygraph examination and relying on it to bypass the Appellant in this case, in addition to the Respondent's previous bypasses of the Appellant in 2008 and 2011. The Appellant was not charged and convicted of an OUI, or for filing a false insurance claim and police report about his computer. The charges against the Appellant in Florida were dropped. Although the Appellant was involved in domestic disputes, they occurred a decade prior to the Appellant's 2013 application; he has been happily married to his second wife for five years and they have two children. The Appellant has been successfully operating a plumbing business since 2008. He has a lengthy and distinguished military record and positive personal and professional references. He further avers that when he was asked at his interview about the scenario involving a fellow firefighter who was stealing, that while he stated that he would discuss it with the fellow firefighter first, he would then also report it to his superiors. In addition, the Appellant states that he was being honest when he said he would not disclose matters noted in the CSP polygraph if the Respondent was not aware of it. The Appellant also argues that it is unfair for the Respondent to consider the polygraph information when no other candidate underwent a polygraph. Finally, the Appellant filed a civil action in Superior Court after the hearing in this case, but prior to this decision, apparently averring that the Respondent violated the Massachusetts polygraph statute, G.L. c. 149, s. 19B. Although the

civil action was dismissed, the Appellant states that the court decision was not dispositive of the civil service issues in the instant case and the court decision simply stated that the Respondent's Motion to Dismiss was granted based on the Respondent's memorandum. Saliba v. City of Worcester, Worcester Superior Court C.A. No. 1585CV00481 (Sept. 17, 2015).¹⁷

The Respondent asserts that the Appellant's criminal, alcoholic, and anger history provide ample, reasonable justification for bypassing the Appellant. As indicated in the arduous and detailed 2013 hiring process, the Respondent found that in 2006 the Appellant filed a false insurance claim and a false police report regarding his laptop computer and that he was charged with aggravated assault after he hit a man for failing to return the Appellant's camera to him. The Appellant was disciplined while in the military for underage drinking and he was counseled for repeatedly being involved in domestic disputes with his then-wife. In addition, the Appellant provided different responses to questions about these and other matters to the WFD than he provided to the WFD in 2011, to the WPD in 2008 and to the CSP in 2007. At his interview, the Appellant was scored poorly by most of the interviewers on essential characteristics such as honesty and integrity, he blamed the polygraph for his bypass rather than taking responsibility for his actions, he indicated that he would lie about these matters if they had not been disclosed through the polygraph examination, and the Appellant responded poorly to the scenario involving a fellow firefighter stealing, stating that he would discuss it with him rather than report it to their superiors. The Respondent adds that the Appellant's assertion that G.L. c. 149, s. 19B precludes employers from obtaining the CSP polygraph information is erroneous and that the

¹⁷ The Superior Court's decision states, in full, "You are hereby notified that on 09/17/2015 the following entry was made on the above referenced docket: Endorsement on Motion to Dismiss (#4.0): ALLOWED After hearing and upon review of the filings of the parties and the authorities relied upon (sic) the defendant's (sic) to dismiss, is allowed for essentially the reasons stated in their motion." Saliba v. City of Worcester, Worcester Superior Court C.A. No. 1585CV00481 (Sept. 17, 2015).

Appellant's civil action in Superior Court relying upon the polygraph statute was dismissed.

Saliba v. City of Worcester, Worcester Superior Court C.A. No. 1585CV00481 (Sept. 17, 2015).

Analysis

The Appellant's overarching reason for appeal is that by relying on information obtained through the CSP polygraph memorandum, the Respondent violated the Massachusetts polygraph statute, G.L. c. 149, section 19B. As noted above, Massachusetts employers may not require applicants to undergo a polygraph exam, whether in Massachusetts or in another state. The Respondent did not require the Appellant to undergo such an exam. Rather, the Respondent became aware of it when the Appellant indicated in his 2013 application for employment at the WFD (and in the Appellant's 2011 application to the WFD and his 2008 application to the WPD) that he had also applied to the CSP for employment. There is no civil service bar to contacting another potential employer to which a candidate has applied for employment in order to obtain employment related information. Appointing authorities are required to conduct a diligent review of a candidate's background in order to satisfy the requirement that they prove that it had reasonable justification for bypassing a candidate. Law enforcement employers are given considerable discretion to adequately assess a candidate's background. The Appellant testified here that the CSP polygraph results were accurate and that he passed the polygraph examination. Indeed there is no proof that the Appellant was not hired by CSP because he was untruthful during the required polygraph examination. In fact, the reasons for the CSP's decision not to hire the Appellant are not in the record. *See* Exs. 32, 48, 49. While it appears that no other candidate for employment at WFD in 2013 had taken a polygraph examination, the results of which were accessible to the Respondent, the Respondent did not require the Appellant to take the polygraph exam. Rather, the polygraph exam was performed by another state's law

enforcement agency in the context of the Appellant's application for employment there. Therefore, the Respondent was not precluded from considering information about the Appellant's polygraph exam. The Superior Court's dismissal of the Appellant's civil complaint for violation of the Massachusetts polygraph statute appears to be in accord.

Although the Respondent was not precluded from obtaining information about the Appellant's polygraph exam, the Respondent's consideration of the polygraph exam memorandum must be addressed. In recommending against hiring the Appellant, the interviewers relied on information in the polygraph exam memorandum regarding the Appellant's juvenile record. Ms. Johnson, Director of Worcester Human Resources, in her letter to the City Manager stating the reasons to bypass the Appellant, correctly excluded the Appellant's juvenile record, which was then more than thirteen (13) years old at that time. Indeed, under the terms of the Respondent's own Preliminary Questionnaire, an applicant can answer "no" to a question regarding juvenile criminal matters. The Appellant had disclosed his juvenile matters previously in his application but by the time the Appellant completed his 2013 application, his juvenile record had been sealed and he was correct to answer "no" about his juvenile record. As a result, the Respondent should not have and did not include the Appellant's juvenile record as a reason for bypassing the Appellant even though the interviewers relied upon it to make their recommendation not to hire him.

The Respondent relied on a number of other matters in the polygraph exam memorandum to justify the Appellant's bypass. For the following reasons, such additional matters may not have provided reasonable justification for the bypass individually but, collectively, they established reasonable justification therefor. In Ms. Johnson's letter to the City Manager stating the reasons for the decision to bypass the Appellant included his "criminal activity." *See, e.g.*

Ex. 2. However, with one exception, most of what the Respondent ultimately relied on to bypass the Appellant does not involve matters for which the Appellant was criminally prosecuted, let alone convicted. In fact, there is only one matter on which the Respondent relies in which the Appellant was even arrested, which is the assault in Florida in 2006. The Respondent notes that the charges from the Florida arrest were dropped but it is not clear that the Respondent was aware that the charges did not make it to court because the Florida prosecutor decided not to prosecute the case. Ex. 42. Thus, while the assault presents serious concerns, it is not a criminal case. Another justification in Ms. Johnson's letter to the City Manager was that in or about 2006, the Appellant also submitted a false insurance claim and a false report to police to obtain payment for a broken laptop computer, representing that it was stolen, not broken. While this also presents concerns, there is no indication in the record that the Appellant was arrested, prosecuted or convicted in this regard.

The polygraph exam memorandum also shows the Appellant's involvement in domestic disputes with his first wife in or about 2002 to bypass the Appellant. Although the Appellant was not arrested or charged for the domestic disputes, the civilian police referred the matter to the military, which required the Appellant to attend domestic violence counseling. These disputes also present a concern. However, there is mitigating information in that the disputes took place more than a decade before the Appellant applied to the WFD in 2013. In addition, the Appellant has been in a successful second married for five years and has two children and there is no evidence of further instances of domestic disputes.

The polygraph exam memorandum also indicates a significant amount of "social drinking" of alcoholic beverages that the Appellant reports as his current rate of consumption, that the Appellant received nonjudicial discipline in the military for underage drinking nearly

thirteen (13) years before the Appellant applied to WFD in 2013, that the Appellant has driven while intoxicated, he used marijuana sometimes from adolescence until the Appellant was honorably discharged from the military, and that he used anabolic steroids briefly. Since the Respondent's 2013 application form does not solicit some of this information, the Appellant should not be deemed to have failed to provide it on his application. There is no indication that the Appellant was arrested, charged, prosecuted or convicted for these actions or that the Appellant has continued these activities since the polygraph exam in 2007, with the possible exception of on-going alcohol consumption. Collectively, however, these matters from the polygraph exam memorandum, when considered along with the mitigating factors cited here, provide reasonable justification to bypass the Appellant and suggest that the WFD concluded that these matters are not far back enough in his rear view mirror to be a WFD firefighter at this time.

The Respondent also avers that it had reasonable justification to bypass the Appellant based on the varying information supplied by the Appellant at different times. The focus here, of course is the Appellant's application for employment in 2013. However, that does not preclude the Respondent from comparing the Appellant's 2013 application to his 2011 application and noting the differences between the two applications. The variations in the Respondent's responses to some of the same questions in the Appellant's 2011 and 2013 applications contributed to the interviewers' perceptions that the Appellant was not forthcoming. At his interview, this perception continued. The interviewers stated that the Appellant did not take responsibility for his actions, blaming the polygraph results for not being hired by either WFD or WPD.¹⁸ The interviewers scored the Appellant poorly for honesty and integrity when he

¹⁸ Ms. Johnson's letter to the City Manager explaining the reasons that the Appellant was bypassed state that there is further justification for bypassing the Appellant in that the CSP did not hire him based on the Appellant's polygraph

responded to some questions. In addition, the Appellant's response to one question at his interview contributed significantly to the interviewers' negative perceptions. Specifically, when asked about a hypothetical question about having seen a fellow firefighter steal something at a fire scene, the Appellant said that he would talk to the firefighter about it. The Appellant testified that he also would have said that he would subsequently report the matter to a supervisor but that the interviewers' responses to his initial statement prevented from supplementing his response. The Respondent was reasonably justified to rely on the Appellant's actual response as a reason to bypass him. The interviewers also asked the Appellant if he would report the matters revealed in the polygraph exam memorandum if the Respondent did not have it, setting up a no-win situation for the Appellant: if the Appellant said that he would disclose it, the Respondent likely would have bypassed him based on the information he disclosed; if the Appellant responded that he would not disclose the information (as he did here), the Respondent would have bypassed him for withholding information. A response to a question to which there is no positive response does not provide reasonable justification for bypass.

To be sure, the Appellant has many strengths, not the least of which are his laudatory seven (7)-year military service, including three tours of duty in Iraq, running his own plumbing business, the number of professional licenses he possesses, as well as the many positive personal, professional and neighborhood references he has. The passage of additional time and properly addressing his previous conduct may ameliorate a public employer's concerns in these regards.

Although I find that the Respondent had reasonable justification to bypass the Appellant, there are two matters requiring the Respondent's prompt redress. Specifically, the Respondent's WFD application does not include the legally required statement informing candidates that

and that the WPD did not hire the Appellant because he withheld information from them (presumably that was contained in the polygraph). As indicated above, the CSP's reason for not hiring the Appellant is not in the record. Appointing authorities are required to conduct a reasonably thorough review of a candidate at each application.

employers cannot require candidates to undergo polygraph examinations. In addition, the Respondent was wrong to ask the Appellant if he has PTSD prior to extending him a conditional offer of employment; the WFD's Waiver form should be amended accordingly.

Conclusion

In view of the above findings and the applicable law, the appeal docketed under G1-14-91 is hereby denied.

Civil Service Commission

Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Camuso, Ittleman, Stein, and Tivnan, Commissioners [Bowman, Chairman – Absent] on January 21, 2016.

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:

Allyson H. Cohen, Esq. (for Appellant)

William R. Bagley, Jr., Esq. (for Appointing Authority)

John Marra, Esq. (HRD)