

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

GARLEN SEONG,
Appellant

v.

**MALDEN FIRE
DEPARTMENT,**
Respondent

Case No.: G1-13-101

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Malden Fire Department to bypass the Appellant for appointment is *not* affirmed and the Appellant's appeal is *allowed*.

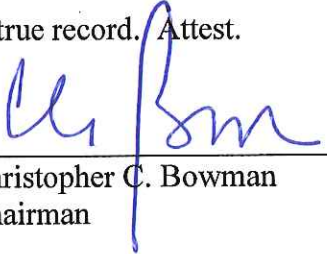
Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the Human Resources Division (HRD) or the Malden Fire Department in its delegated capacity to take the following actions:

- Place the name of Garlen Seong at the top of the current or next certification for appointment to the position of permanent full-time firefighter in the Malden Fire Department until he is appointed or bypassed.¹
- If Mr. Seong is appointed, he shall receive a retroactive seniority date for civil service purposes only the same as those appointed from Certification No. 00386. This seniority date is not meant to provide Mr. Seong with any additional compensation or benefits including credit towards retirement.

¹ The Commission is fully aware that Mr. Seong's name appeared on a special certification for Cantonese-speaking individuals. To ensure that Mr. Seong actually receives relief here, the Commission's has opted to order that his name be placed at the top of the current or next certification for firefighter, even if that certification is not restricted to Cantonese-speaking individuals. (See Mulhern v. Civ. Serv. Comm'n, Suff. Sup. Crt. 99-4310A (2001) (concluding that the Commission's discretionary authority regarding remedial relief is particularly broad).

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 9, 2014.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Garlen Seong (Appellant)

Thomas E. Brennan, Esq. (for Respondent)

John Marra, Esq. (HRD)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
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DALA Docket No. CS-13-401
CSC Docket No. G1-13-101

GARLEN SEONG,
Appellant

v.

CITY OF MALDEN,
Appointing Authority

Appearance for Appellant:

Garlen Seong


Appearance for Appointing Authority:

Thomas E. Brennan, Esq.
Law Department
City of Malden
200 Pleasant Street
Malden, MA 02148

Administrative Magistrate:

Kenneth Bresler

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

SUMMARY OF RECOMMENDED DECISION

Since Appointing Authority did not produce documents as ordered, leading to adverse inferences, and did not support its offered reasons to bypass the candidate with credible evidence or common sense, bypass was not justified and candidate should be placed at top of an appropriate certification list.

RECOMMENDED DECISION

The petitioner, Garlen Seong, appeals under M.G.L. c. 31, § 2(b) the Appointing Authority's decision to bypass him for a firefighter position with the Malden Fire Department.

I held a hearing on August 5, 2013, which I recorded digitally. Mr. Seong testified, and called no other witness. Malden called two witnesses, Thomas E. Denehy, the Fire Commissioner, and John Colangeli, the Fire Chief.

I have accepted into evidence six exhibits. Both parties submitted post-hearing arguments.

Discovery

At June 4, 2013, at the prehearing conference, Civil Service Commission Chairman Christopher Bowman ordered the Malden Fire Department to provide to Mr. Seong the driving history of the successful applicant, for whom Mr. Seong was bypassed, and "rating sheets, etc.," which I interpret to mean the interviewers' notes from the interview for this position. Chairman Bowman ordered the Malden Fire Department to provide these documents prior to the hearing.

Malden complied with the exact letter of Chairman Bowman's order. It responded prior to the hearing – but almost two months after Chairman Bowman's order. Mr. Seong received the Malden Fire Department's response on Friday, August 2, 2013. It was prior to the hearing on Monday, August 5, 2013. However, it barely left enough time for Mr. Seong to prepare – if the Malden Fire Department had actually produced all of the documents that Chairman Bowen ordered it to produce.

However, the Malden Fire Department did not produce all of the documents, and Mr. Seong did not have enough time to object to the non-production. The next full working day was the day of the hearing.

At the August 5, 2013 hearing, Mr. Seong objected to not having received all of the documents.¹ The Malden Fire Department's lawyer gave me a document titled Respondent's Response to Request for Production of Documents, dated July 30, 2013. Although it had a signature block for the Malden Fire Department's lawyer and a certificate of service, both places for a signature were blank. Mr. Seong said that he did not receive the document.

Between the title of the document and the unsigned signature block, the document reads in its entirety:

Request No. 1 – Produce the interview notes / questions of the applicant chosen.

Response – None in the respondent's custody or control.

Request No. 2 – Copy of the driving records of the applicant chosen.

Response – The respondent objects to this request on the grounds that it seeks private and Privileged information. Without waiving the objection, the respondent further states it does not have the documents in its custody or control.

("Privileged" is capitalized in the original.)

The many problems with this document are these: The Malden Fire Department did not inform the Civil Service Commission or the Division of Administrative Law Appeals that it could not comply with the discovery order – and that if it could comply, it would not comply with what it calls the second request. The Malden Fire Department made an objection about privilege – but not to the Civil Service Commission, which could actually have ruled on it. The Malden Fire Department did not cite any authority for the supposed privacy or privilege, and probably cannot do so. The Malden Fire Department did not raise this objection at the June 4, 2013 prehearing conference. It waited 57 days to object in a letter that it did not send to the Civil

¹ It is unclear what documents Mr. Seong did receive. In an attempt to sort out this issue, on August 6, 2013, after the hearing, I ordered Mr. Seong to produce the documents that he received from the Malden Fire Department. I did not receive them.

Service Commission. This was not simply a “request,” as the Malden Fire Department put it four times; it was an order by the Civil Service Commission. The Malden Fire Department used boilerplate – “custody or control” – without explaining in the letter what had happened to the documents, *why* they were not in the Malden Fire Department’s custody or control. At the hearing, the Malden Fire Department’s lawyer explained that it had discarded the documents. The Malden Fire Department’s supposed inability to produce the successful applicant’s driving record – to get another copy, if necessary – is, without further explanation, not credible.

At the hearing, I announced that I would draw adverse inferences from the Malden Fire Department’s non-production of documents.

On the day after the hearing, I issued an order that read in part:

At the hearing on August 5, 2013, Thomas E. Brennan, representing Malden, handed me a document titled Respondent’s Response to Request for Production of Documents, dated July 30, 2013. It is not signed. If a copy of this document that was signed on July 30, 2013 exists, Malden will send me a copy....

I was not asking for the Malden Fire Department to sign the unsigned July 30, 2013 letter and send it to me. I was asking for a copy that was signed on July 30, 2013. On August 8, 2013, the Division of Administrative Appeals received a signed version of the July 30, 2013 document. However, the signed and unsigned documents were not the same document; *e.g.*, the certificate of service on the unsigned document has a line for Mr. Brennan’s signature, while the signed document does not have a line; the unsigned letter correctly refers to “Malden,” while the signed document refers three times to “Maiden” with an “i.”

I do not know what to make of the differences in documents, but the fact that Malden has given me two versions of the documents; the fact that Malden handed me an unsigned document at the hearing; and Mr. Seong’s assertion that he did not receive this document lead me to doubt the accuracy of the certificate of service.

Findings of Fact

1. According to the 2010 census, the City of Malden had over 60,000 residents. Approximately 20% were Asian. (Ex. 5.)
2. The Malden Fire Department responds to over 8,400 calls a year. Seventy percent are for medical aid. (Ex. 5.)
3. It is important that members of a fire department be able to communicate with residents, no matter what language the residents speak. This is especially true during calls for medical aid. (Ex. 5.)
4. The Malden Fire Department decided that having a Cantonese-speaking responder in its Fire Alarm Division would enhance the department and serve Malden residents better. (Ex. 5.)
5. On January 9, 2013, the Malden Fire Department asked the Human Resources Division for a selective certification to appoint a full-time Cantonese-speaking firefighter. (Ex. 5.) The department received a selective certification. (Denehy testimony.)
6. Garlen Seong was a 25-year-old resident of Malden when he applied to become a firefighter with the Malden Fire Department. He speaks Cantonese. (Ex. 1, Seong testimony.)
7. Among three Cantonese-speaking candidates, Mr. Seong had the highest examination score. (Ex. 5, third-to-last p.; stipulation; Denehy testimony.)
8. In early 2013, members of the Malden Fire Department interviewed Mr. Seong and other candidates. Commissioner Denehy and Chief Colangeli were on the interview panel. (Denehy and Colangeli testimony.)

9. The panel asked candidates questions from a standard list of questions, but did not ask every candidate every question. The panel did not ask every candidate the same questions. (Ex. 4, Denehy and Colangeli testimony.)

10. Most of the panel members took notes during the interviews. Commissioner Denehy did not; his usual practice is not to take notes. (Denehy and Colangeli testimony.)

11. Mr. Seong was hesitant and uneasy during his interview. (Denehy and Colangeli testimony.)

12. Commissioner Denehy favors candidates who look at him during the interview and who are decisive and sure of themselves. (Denehy testimony.)

13. Chief Colangeli favors candidates who are self-confident and have Type A personalities, because they are more likely to risk their lives to perform their duties. (Colangeli testimony.)

14. The panel preferred the answers of the other candidates over Mr. Seong. (Denehy and Colangeli testimony.)

15. When asked what he would do in his free time, Mr. Seong said he was a diesel mechanic and would pursue further training. (Colangeli testimony.)

16. Mr. Seong's driving record showed two speeding tickets, one in 2006 (which the Stoughton District Court apparently dismissed), and one in 2007. (Ex. 1, last page; Seong testimony.)

17. The interview process did not include an evaluation of how well the candidates spoke Cantonese. (Seong testimony.)

18. On March 13, 2013, Malden sent Mr. Seong a bypass letter. It gave "the following reasons":

- 1) Your inability to answer the most basic questions was not acceptable to the entire panel.
- 2) You had a below average evaluation by the panel due to an overall poor performance.
- 3) A questionable driving record.

(Ex. 2.)²

19. Malden bypassed Mr. Seong for a candidate whose initials are KHL. The selection letter cited these reasons:

- 1) Your Background check showed you to be a good citizen with excellent recommendations.
- 2) You had an excellent interview and the entire panel believes you will be an asset to the Department.
- 3) You are an Army Veteran.
- 4) You have a degree in Physical Fitness.
- 5) You are a Certified EMT.

(Ex. 3.)

20. Malden knew that Mr. Seong might appeal its decision. Its bypass letter to him referred to his right to appeal. (Ex. 2.) So did a second letter, also dated March 13, 2013, which further explained the appeal process. (Ex. 5.)

² Before the hearing, during discussion of whether the appointing authority had complied with the Civil Service Commission's order to provide to Mr. Seong the driving record of the hired candidate, the appointing authority offered to withdraw Mr. Seong's driving record as a reason for the bypass. I am aware of no authority that allows an appointing authority to withdraw a reason for a bypass during an appeal, and no authority that allows the presiding officer to consider such a withdrawal. Accordingly, I did not accept the appointing authority's offer.

During the appointing authority's closing argument, it attempted to expand the reasons why it had bypassed Mr. Seong to his alleged lateness at the prehearing conference before the Civil Service Commission. I did not allow it to do so. There are fairness and possible due process implications of an appointing authority's expanding the reasons for the bypass after sending the bypass letter. And there is a logical problem, as well, for an appointing authority to allege that a bypassed appellant's conduct during the appeal process is a retroactive justification for the bypass that he is appealing.

21. After interviewing and selecting candidates, the Malden Fire Department destroys the panel's interview notes, and the candidates' criminal histories and driving records. It has done so for decades, because it does not consider them relevant to anyone. (Colangeli testimony).

22. In an appeal dated April 1, 2013 and received by the Civil Service Commission on April 22, 2013, Mr. Seong timely appealed. (Ex. 6.)

Discussion

From a human perspective and the standpoint of civility, the hearing was admirable. Both of Malden's witnesses, while testifying, turned to Mr. Seong and addressed him personally in the second person – "you" – to explain why the Malden Fire Department had bypassed him. From a legal standpoint, the Malden Fire Department's presentation was deficient. The Malden Fire Department did not demonstrate by a preponderance of the evidence that it was justified in bypassing Mr. Seong. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241(2006).

I draw an adverse inference from the following acts, omissions, and stances by the Malden Fire Department: It failed to tell the Civil Service Commission at the prehearing conference, or as soon as possible afterward, that the documents it had been ordered to turn over were not available. It failed to tell the Civil Service Commission, which could have ruled on its claim of privilege, that it was invoking privilege for some documents that it had been ordered to turn over. It failed to directly tell the Civil Service Commission or the Division of Administrative Law Appeals (DALA) that it was not turning over documents to Mr. Seong that it had been ordered to turn over; instead, it sent him a letter. It so delayed telling Mr. Seong that it was not turning over documents to him that it precluded him from objecting before the hearing. The Malden Fire Department professed to be unable to obtain another copy of KHL's driving record.

See Chandler v. Prince, 217 Mass. 451, 458 (1914) (“failure to produce evidence...is foundation for the drawing of adverse inferences”). *See also* 801 CMR1.01(8)(i).

The concept of privacy, such as for successful and unsuccessful civil service candidates, cannot become a shield against disclosure, when the appropriate concept is transparency, not privacy.

I also find disconcerting the following: The Malden Fire Department first produced an unsigned certificate of service. When I ordered a signed copy, it produced a different document.

The Malden Fire Department told Mr. Seong that it had bypassed him for three reasons: his “inability to answer the most basic questions”; his “below average evaluation by the panel due to an overall poor performance”; and a “questionable driving record.” (Ex. 2.)

Regarding Mr. Seong’s alleged inability to answer the most basic questions, the Malden Fire Department did not introduce evidence about what questions it asked Mr. Seong, other than what he would do in his free time, and what his responses, semi-responses, or non-responses were. It introduced a list of question from which questions posed to Mr. Seong were drawn (Ex. 4), but that is not the same as introducing evidence of the questions that it asked Mr. Seong. Not only did the Malden Fire Department not produce the rating sheets and interview notes – and I draw an adverse inference that those documents would undermine the Malden Fire Department’s contention that Mr. Seong failed to answer the most basic questions – but it did not offer testimony on this reason to bypass Mr. Seong.

“Reasonable justification in this context means done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Police Department of Boston v. Kavaleski*, 463 Mass. 680,

688 (2012)(citations and internal quotation marks omitted). However, there was no “credible evidence,” *id.*, for this purported justification to bypass Mr. Seong.

Regarding Mr. Seong’s alleged below average evaluation, the Malden Fire Department did not introduce exhibits or testimony about Mr. Seong’s evaluation, what made it below average, and what an average evaluation is. Thus, there was no “credible evidence,” *id.*, for this purported justification to bypass Mr. Seong. In addition, I draw an adverse inference from the Malden Fire Department’s failure to produce rating sheets or interview notes; I infer that these documents would have undermined the department’s contention that Mr. Seong’s evaluation was below average.

The Malden Fire Department did introduce testimony that Mr. Seong did not present himself dynamically in an absolute sense and relative to the two other candidates. (Denehy and Colangeli testimony.) However, that is not the same as demonstrating that Mr. Seong had a below average evaluation. The Malden Fire Department cannot offer one reason in its bypass letter and attempt to demonstrate a different reason for the bypass in the appeal. That is what Personnel Administrative Rule .08(4) states:

No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission.

Regarding Mr. Seong’s “questionable driving record,” it consisted of two speeding tickets, one in 2006, apparently dismissed, six-and-one-half-years before his application, and one in 2007, six years before his application. A reasonable justification must be “guided by common sense.” *Kavaleski*, 463 Mass. at 688. It is not common sense to bypass a firefighter candidate for such a minor and dated driving record. The Malden Fire Department offered no explanation for why Mr. Seong’s minor and dated driving record concerned it.

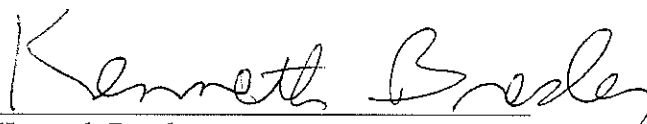
In addition, I draw an adverse inference from the department's failure to produce the successful candidate's driving record; I infer that it would have shown a worse and more recent driving record. A bypass will not be upheld when "the reasons offered by the appointing authority...apply equally to the higher ranking, bypassed candidate...." *David L. Radochia, Jr., v. City of Somerville*, G1-11-145 at 17 (Nov. 29, 2012)(citation and internal quotation marks omitted). It follows all the more strongly that a bypass will not be upheld when a reason offered by the appointing authority for bypassing a candidate applies more strongly to the successful candidate. *See* Ex. 6 (Mr. Seong's letter to CSC, alleging that successful candidate's driving record was worse and more recent).

Finally, the Malden Fire Department's application and selection process was deficient because it did not assess the candidates' fluency in Cantonese. *See Christopher Maynard v. MBTA Police Department*, G2-05-12 and 177 (March 15, 2007)("In addition, there is no evidence that the MBTA ever questioned the candidates about their language skills during the selection process, and its bypass submission to HRD failed to mention the language skills of any other candidates, either selected or non selected.").

Conclusion and Order

I recommend that the Civil Service Commission, under the powers of relief inherent in Chapter 310 of the Acts of 1993, order the Malden Fire Department to place Mr. Seong at the top of the next appropriate certification list. *E.g., Brendan Murphy v. Boston Police Department*, G1-10-348 (Aug. 22, 2013), *Maynard v. MBTA Police Department*, *Mulhern v. Civil Service Commission*, 57 Mass. App. Ct. 920 (2003).

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script that reads "Kenneth Bresler". The signature is written in dark ink and is positioned above a horizontal line.

Kenneth Bresler
Administrative Magistrate

Dated: **NOV 20 2013**