

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

BRIAN K. SOUZA,
Appellant

v.

G1-18-140, G1-19-037

TOWN OF STONEHAM,
Respondent

Appearance for Appellant:

James Hykel, Esq.
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Boston, MA 02109

Appearance for Respondent:

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Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Brian Souza (hereinafter "Mr. Souza" or "Appellant"), filed timely appeals with the Civil Service Commission (hereinafter "Commission") on August 3, 2018 and February 15, 2019 under G.L. c. 31, § 2(b), appealing the decision of the Town of Stoneham (hereinafter "Town" or "Respondent") to bypass him for appointment to the permanent, full-time position of firefighter in the Stoneham Fire Department (hereinafter "Department" or "SFD"). A prehearing conference was held regarding G1-18-140 on September 18, 2018 at the Commission's office in Boston. A full hearing was held at the same location, regarding G1-18-

140, on November 6, 2018.¹ A prehearing conference was held in the second appeal, regarding G1-19-037, on March 12, 2019. The parties agreed to consolidate these two appeals. A full hearing regarding G1-19-037 was held on May 2, 2019 also at the Commission's office in Boston. The hearings for both G1-18-140 and G1-19-037 were digitally recorded and copies of the recordings were sent to the parties.² For the reasons indicated below, the appeals are allowed.

FINDINGS OF FACT:

Fifteen (15) exhibits were entered into evidence at the hearing regarding G1-18-140 and twenty-two (22) exhibits were entered into evidence at the hearing regarding G1-19-037. Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority in both G1-18-140 and G1-19-037:

- Matthew Grafton, Stoneham Police Chief

Called by the Appellant in both G1-18-140 and G1-19-037:

- Brian Souza (Appellant)

and taking administrative notice of all matters filed in the case; stipulations; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

Appeal Docketed as G1-18-140

1. At the time of the Commission hearing, the Appellant resided in Stoneham,

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

² If there is a judicial appeal of the decision in either or both G1-18-140 and G1-19-037, 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. In such cases, this digital recording sent to the parties should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Massachusetts. (Testimony of Appellant; Jt.Ex. 3)

2. At the age of 17, in 2005, the Appellant enlisted in the Marine Corps. Following active duty, the Appellant's service ended in 2011. (Testimony of Appellant; Jt.Ex. 3)
3. The Appellant was appointed to Presidential Support duty from 2006 to 2008. The purpose of this appointment was to be responsible for the safety of then-President Bush, and it entailed travel to different countries for private security details and being stationed at the White House. (Testimony of Souza)
4. The Appellant received the Good Conduct Medal from the Marine Corps for his service from 2006 to 2009 for "exemplary personal and professional conduct". (Jt.Ex. 11)
During that same time period, the Appellant received a non-judicial punishment for putting a microwave oven from the common area of the barracks into his room until he was able to have his own microwave oven fixed. (Testimony of Souza; Jt.Exs. 3 and 11)
5. The non-judicial punishment included 45 days of extra military duty and restriction to his room. However, the Appellant was only required to serve two days before he discussed the matter with his commanding officer, who promptly removed the remaining restrictions. (Testimony of Souza)
6. The Appellant was deployed from September 2009 to May 2010 in Kuwait as a squad leader of twelve Marines. His assignment was to train foreign forces of between 200 to 1,000 people. (Testimony of Souza)
7. When the Appellant returned to the U.S. following deployment, he resided in California, where he met his now-former wife. (Testimony of Appellant)
8. The Appellant's marriage was troubled. In addition, in March 2011, while he lived in California, the Appellant's driver's license was temporarily suspended due to a charge of

Operating Under the Influence of alcohol.³ In May 2011, the Appellant and his wife returned to Massachusetts. On or about June 10, 2011, the Appellant was arrested for assault and battery in connection with an argument with his then-wife. The case was dismissed (without prejudice) on November 16, 2011 when the Appellant's then-wife refused to testify. (Jt.Ex. 7) On or about October 14, 2013, the Appellant was involved in another argument with his then-wife and he was arrested and charged with assault and battery and intimidation of a witness, which charges were dismissed via nolle prosequi on December 2, 2013 when the Appellant's then-wife refused to testify.⁴ The Appellant averred to the SFD interviewers and at the Commission hearing that his then-wife was untruthful in regard to both his 2011 and 2013 arrests. (Testimony of Appellant; Jt.Exs. 6 and 7)

9. The Appellant's father and others in his family have been employed by the Cambridge, Massachusetts Fire Department (CFD). In 2011, the Appellant applied for a firefighter position in CFD but then withdrew his application. He was not disqualified as a candidate at the CFD. (Testimony of Appellant; Jt.Ex. 5)

10. In 2011 and 2012, the Appellant was enrolled at Bunker Hill Community College (BHCC) focusing on fire service. The courses he took included Principles of Fire Safety,

³ The Appellant asserts that the California OUI charge against him was not the same as it is in Massachusetts in that a person so charged can instead be found responsible for a lesser included offense. The evidence in the record in this regard is inconclusive. Further, while the nature of the California charge may be different than the OUI statute in Massachusetts, the end result was that the Appellant lost his license, just as someone charged with an OUI under Massachusetts law may also lose their license.

⁴ The application for criminal complaint indicates that the police officer who filed it noted, "[t]he undersigned alleges the following as a ... partial statement of the factual basis for the offense(s) for which a criminal complaint is sought". (Jt.Ex. 6)(emphasis added). Indeed, the police application for criminal complaint makes no mention of the Appellant's statements and the Assistant District Attorney's response to discovery indicated that the prosecution was "not in possession of any written or recorded statements of the defendant". Id. I note that a preliminary court document in the 2013 case ordered the Appellant not to commit a crime during the proceedings and not to possess firearms or dangerous weapons but it did not order the Appellant to avoid all contact with his then-wife. Id.

Hazardous Material Chemistry, Fire Prevention, Fire Protection Hydraulics, Fire Protection Systems, and Fire Behavior and he obtained his EMT certificate. These courses supplemented the fire and hazmat-related training the Appellant received while in the Marines. The Appellant has also earned certificates in a number of related FEMA and Red Cross courses. (Testimony of Appellant; Jt.Ex. 10) The Appellant did not graduate from BHCC. (Jt.Ex. 3)

11. The Appellant and his then-wife separated in January 2014 and divorced in October 2014. Thereafter, the Appellant changed his life style, significantly reducing his alcohol consumption. (Testimony of Appellant)
12. The Appellant has been working at Pest Control since 2011 and has been promoted to Heat Supervisor. (Testimony of Appellant)
13. Since 2012, the Appellant has been in the Marines Reserves and he is now a Sergeant in the Reserves who is responsible for training and mentoring junior Marines. At or about the time of the hearing in this case, the Appellant had also been selected as the Noncommissioned Officer for the quarter for his regiment. (Testimony of Souza; Jt.Exs. 5 and 11)
14. In or about April 2016, the Appellant, a disabled veteran, took and passed the firefighter civil service exam. (Prehearing Stipulations)
15. In response to its request to the state's Human Resources Division (HRD), the Town received certification 05473 to pursue the hiring process to fill two vacancies in the Department. The Appellant's name appeared first on this certification and he signed it. (Testimony of Souza; Jt.Ex. 1)

16. The Appellant obtained and completed an application for the firefighter position at SFD on June 4, 2018. (Jt.Ex. 3)

17. The application section pertaining to criminal records states, in part,

“With regard to questions contained in this section, under Massachusetts Law, you may answer ‘no record’ if:

- (1) You have never been arrested for violation of a criminal statute;
- (2) You have been arrested but have never been tried for a criminal offense;
- (3) You have been tried for a criminal offense but were not convicted;
- (4) You have a first conviction for an of the following misdemeanors:
 - (a) Drunkenness;
 - (b) Simple assault;
 - (c) Speeding;
 - (d) Minor traffic violation;
 - (e) Affray, or
 - (f) Disturbance of the peace;
- (5) You have not been convicted of a criminal offense within the **five years** before the date of this application and you have been convicted of misdemeanors where the date of conviction or the termination of incarceration, if any, occurred more than five years before the date of this application;
- (6) You have felony or misdemeanor convictions which have been sealed pursuant to Massachusetts Law; or
- (7) You have juvenile delinquency or child in need of services complaints which were not transferred to the Superior Court for prosecution.
 - a. Record – Yes___ No ___
 - b. Have you been convicted of a misdemeanor offense within the last 5 years other than the first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace? Yes ___ No ___
 - c. Were convicted of a misdemeanor (other than first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace) more than 5 years ago which resulted in a jail sentence from which you were released within the last 5 years? Yes ___ No___
 - d. If your answer to any of the three preceding questions (a. b. or c.) is yes, please describe” (R.Ex. 3)(emphasis in original)

The Appellant answered “no” to these questions. (Jt.Ex. 3)

18. The employment section of the application asked if the candidate has ever been accused of stealing from an employer and has been disciplined by an employer. Treating his service in the Marines as an employer, the Appellant answered “yes” — adding in

response to both questions that he had received a non-judicial punishment in 2008.

(R.Ex. 3)

19. The application also asked if any disciplinary action had been taken against the candidate in the military. The Appellant wrote that he had received a non-judicial punishment (“Article 121 (Larceny)”) in 2008. (Jt.Ex. 3)

20. In response to a question asking if the applicant has ever been or was currently the subject of a petition for a domestic abuse restraining order under c. 209A “or other abuse prevention statutes ...”, the Appellant answered “yes”, in Cambridge on October 15, 2013. (Jt.Ex. 3) There is no reference to a G.L. c. 209A (or related statute) civil domestic abuse restraining order in the court records in Jt.Ex. 6 regarding the Appellant’s 2013 arrest. However, on Oct. 15, 2013, as part of the court’s order regarding the Appellant’s bail and/or release pending trial, the Appellant was ordered, among other things, to avoid contact with his then-wife. One month later, on November 19, 2013, the order requiring the Appellant to avoid contact with the Appellant’s then-wife was ended by the court. The court records in Jt.Ex. 7, regarding the Appellant’s 2011 arrest, explicitly state that the Appellant’s then-wife was advised of the ability to request a restraining order and she declined to do so. (Jt.Exs. 6 and 7)

21. The section of the application regarding candidates’ drivers records states, “**Driving Record – Applicants will be required to provide their Public Driving Record.**”

(Jt.Exs. 5, 13 and 14)(emphasis in original)⁵

⁵ It is unclear if the drivers records that Chief Grafton reviewed during the hiring process were the records provided by the Appellant and the two candidates who bypassed him (Candidates A and B) or if he or the Town’s Human Resources office also obtained the candidates’ drivers records from the RMV.

22. In response to application questions regarding the candidate's driver record, the Appellant wrote that his license had been suspended for an OUI in March 2011 and that he had been involved in five (5) surchargeable car accidents; one in 2004, two in 2005, one in 2013 and one in 2015. (Jt.Exs. 3 and 8)
23. In response to the application question asking if the candidate had been denied a license to carry a firearm (LTC), the Appellant wrote that the Stoneham Police Department ("SPD") had denied his LTC application on February 23, 2017 "because of arrests for Domestic Assault & Battery". (Jt.Ex. 3)
24. The Appellant was interviewed for the firefighter position on June 8, 2018 by Chief Grafton, Human Resources Director Donna Gaffney, Captain James Marshal, and Captain Al Minotti. ((Jt.Ex. 5)
25. At the time of the hearing in the appeal for docket number G1-18-140, Chief Grafton had worked with four different appointing authorities (Town Administrators). (Testimony of Grafton)
26. At the Appellant's interview, the Appellant gave the interviewers documents relating to his 2011 and 2013 arrests and his military discipline in 2008. (Testimony of Grafton; Jt.Exs. 5, 6 and 7) The interviewers took notes about the interview, which notes are included in the record. (Jt.Ex. 5)
27. Chief Grafton's interview notes for the Appellant state that the Appellant had an "excellent" appearance, was "well spoken" and had a "great interview." He noted that the Appellant discussed his troubled marriage from 2011 to 2014, he disclosed all of the court documents about his arrests and he stated that he had grown up since that time period. (Jt.Ex. 5)

28. In response to interview questions, Chief Grafton wrote that the Appellant addressed the OUI and allegations of domestic assault. (Jt.Ex. 5) Regarding the OUI, Chief Grafton noted that the Appellant described it as a “wet” OUI, which was less serious in California than in Massachusetts.⁶ (Testimony of Grafton; Jt.Ex. 5) No one was injured as a result of the OUI. (Testimony of Appellant)
29. Chief Grafton vaguely recalled that the Appellant described his alleged larceny in the military as exchanging a broken microwave oven for one that was working, which led to a non-judicial punishment. Although Chief Grafton did not know what a non-judicial punishment was, he recalled that he found that the microwave incident was not as serious as it sounded on paper. (Testimony of Grafton)
30. Regarding the domestic assault allegations against the Appellant, Chief Grafton wrote in his notes regarding the Appellant’s interview that the Appellant had been in a bad relationship with his wife and that the charges were dropped. Similarly, Capt. Minotti’s notes from the Appellant’s interview stated that the Appellant had been in a “bad marriage”. Ms. Gaffney’s notes of the Appellant’s interview state that the Appellant told the interviewers that he had only been “arguing” with his then-wife. (Jt.Ex. 5)
31. With respect to the interview question asking candidates about integrity, Chief Grafton wrote that the Appellant acknowledged that it is important for firefighters because they are required to go into peoples’ homes and that in his work since 2011 at a pest control company he too was entrusted to enter peoples’ homes. (Jt.Ex. 5)
32. Asked at the Commission hearing about the Appellant’s good judgment under stress, Chief Grafton stated that he believed that someone who has served in the Marines, like

⁶ The California OUI statute may provide for a disposition akin to reckless driving although there is insufficient evidence in the record in this regard.

the Appellant, should be able to exercise good judgment under stress. (Testimony of Grafton)

33. Chief Grafton reviewed the Appellant's driving record, which record is dated June 3, 2018, five (5) day prior to the Appellant's interview. The Chief considered the Appellant's 2015 surchargeable accident and failure to obey a sign on the Mass. Turnpike in 2013. He did not consider as recent motor vehicle related infractions events more than five (5) years old, including the Appellant's 2011 OUI. (Testimony of Grafton; Jt.Ex. 8)
34. Also on the Appellant's driving record is a 2012 speeding violation, a 2012 inspection sticker infraction, a 2011 inspection sticker infraction, and payment defaults in 2012 and 2014 (both of which were paid within the prescribed period). (Jt.Ex. 8)
35. The interviewers did not score or rank the candidates they interviewed. (Testimony of Grafton)⁷
36. After the Appellant's June 8, 2018 interview, the interviewers agreed that the Appellant had an excellent interview, he was well prepared, and he presented well. They also discussed the Appellant's arrests, his driving record, and the microwave problem the Appellant had while he was in the Marines. The interviewers recommended that the appointing authority hire the Appellant. The appointing authority was then-Town Administrator Thomas Younger. (Testimony of Grafton)
37. On June 21, 2018, nearly two weeks after the Appellant's interview, Capt. Marshall called the Appellant's references and nothing of concern arose. (Testimony of Grafton;

⁷ Although the Appellant asserts that the four (4) candidates who were interviewed were asked different questions, I find that the only information in the record about this is that one other candidate (Candidate B) was asked 20 question and the Appellant was asked 17. The three (3) questions that the interviewers did not ask the Appellant were what are your hobbies, what has been your favorite job, and if the candidate would still be interested in the position if he knew that the job required a EMT license. I do not find these three (3) questions and their answers had a disparate effect on the Appellant's candidacy.

Jt.Ex. 5)

38. After the Appellant's interview and after Capt. Marshall checked the Appellant's references, Ms. Gaffney conducted a criminal record check on the Appellant, in which she found no new information in addition to the information that the Appellant had given the interviewers. (Testimony of Grafton) There is no indication in the record that the Town or the Department provided the Appellant with a copy of his criminal record, as required by G.L. c. 6, § 171A.
39. Chief Grafton believed that the steps in the hiring process began with interviews, which were followed by various steps in the following order: reference checks by the SFD, criminal record checks by the Town Human Resources staff, a candidate's medical exam, a candidate's psychological exam, and then issuance of a conditional offer of employment to the candidate. Chief Grafton believed that this process may be changing. (Testimony of Grafton)
40. Chief Grafton would speak with Town Administrator Younger at various unspecified times. The Chief picked up his mail near the Town Administrator's office. At some point during the hiring process, Chief Grafton recommended to Town Administrator Younger that he hire the Appellant. At an unspecified time thereafter, Mr. Younger told Chief Grafton to "take a better look" at the Appellant. Thereafter, Chief Grafton did not give the Appellant a conditional offer. (Testimony of Grafton) There is insufficient evidence in the record to establish that Mr. Younger saw the Appellant's application as well as the selected candidates' application and records. It is unclear whether Mr. Younger reviewed the Appellant's application and the applications and records of the candidates who bypassed the Appellant.

41. In response to Mr. Younger’s brief statement to Chief Grafton to “take a better look” at the Appellant’s candidacy, Chief Grafton went to court to obtain copies of the court documents related to the Appellant’s arrests. The documents that Chief Grafton obtained were the same as those provided by the Appellant at his interview. (Testimony of Grafton)
42. Thereafter, Chief Grafton observed, “well, the Town Administrator is the appointing authority and basically it was a no go on [the Appellant] at that point. He wouldn’t hire him and I knew that.” (Testimony of Grafton)
43. Chief Grafton had input into the bypass letter that was sent to the Appellant, which information he provided to the town attorneys. (Testimony of Grafton) Mr. Younger, the Town Administrator signed the bypass letter. (Jt.Ex. 2) The Appellant was bypassed by Candidates A and B. (Jt.Ex.2; Stipulation)
44. The bypass letter is dated July 26, 2018 and states that the Appellant has a “very extensive and concerning driving record history” from 2004 to 2015; he was arrested in 2011 and 2013 and charged with assault and battery on his wife as alleged in police reports and in the 2013 incident he was also charged with intimidation of a witness; he received a non-judicial punishment for larceny in the military for stealing a microwave oven; he was denied an LTC by the Stoneham Police Department; and he was “disqualified from consideration” by the Cambridge Fire Department. (Jt.Ex. 2)
45. The bypass letter indicated that two (2) candidates ranked below the Appellant on the Certification were hired for the following reasons:
- Candidate A – he is an EMT (like the Appellant); he is a Lieutenant on the Stoneham Fire Auxiliary; he teaches boy scouts about fire service; he works for a fire protection systems company; he has certificates in a number of related areas; has a Bachelor’s degree in Marketing; positive references; an “extraordinary interview”; and a “clean criminal

record”. However, the bypass letter makes no mention of Candidate A’s driving record; and

Candidate B – he is a veteran who was a military police officer; he has a work history and references showing that he is a “dependable, reliable and dedicated team player”; his interview was “excellent”; he showed a “great deal of integrity in both the interview process and during the background check”; and he has an “excellent driving record” and “clean criminal record”. (Jt.Ex. 2)

46. Mr. Younger did not appear and testify at the Commission hearing regarding the manner in which he decided to bypass the Appellant and hire Candidates A and B. Nor did any successor appointing authority. In addition, there is no indication in the record that Mr. Younger either reviewed the interviewers’ notes of the candidates’ interviews or that he discussed the candidates’ interview performances with the Respondent’s sole witness - Chief Grafton. (Administrative Notice) Consequently, Mr. Younger’ assertions in the bypass letter sent to the Appellant asserting that Candidate A had an “extraordinary interview” and that Candidate B exhibited had an “excellent” interview are unsupported. (Jt.Ex. 2)

47. Chief Grafton was the only member of the interview panel and the Town who testified at the Commission hearing even though he is not the appointing authority for the Town. (Administrative Notice)

48. The bypass letter does not indicate that:

in his application, Candidate A refused to authorize the SFD to contact 3 of his 5 prior employers;

Candidate A’s position at a private fire protection business is in sales;

Candidate A stated in his application that he has no criminal record but there is no document in the record indicating that the SFD checked the appropriate criminal record authority to verify his statement; and

Candidate A noted in his application that he received a “written notice” for speeding in 2016. In addition, although Candidate A’s application indicates that

he has a license to drive a car, owns or has access to a car and has had no accidents, the driver's record in evidence is only for a motorcycle license that expired at or around the time that he completed his SFD application, for which no violations are indicated.
(Jt.Exs. 2 and 14)

49. The bypass letter does not indicate that:

Candidate B's application indicates that he has a license to drive a car, owns or has access to a car, and has had one accident. There is no indication whether Candidate B was found responsible for the accident. Like Candidate A, the driver's record in evidence for Candidate B is only for a motorcycle license that expired at or around the time that he completed his SFD application, for which no violations are indicated. In addition, Candidate B's car accident is not reflected on the driver's record that he provided;

Candidate B stated in his application that he has no criminal record but there is no document in the record indicating that the SFD checked the appropriate criminal record authority to verify the statement in his application; (Jt.Ex. 13)

Unlike the Appellant, Candidate B did not have an EMT license at the time of his application to the SFD. (Testimony of Grafton)

Appeal Docketed as G1-19-037

50. At an unspecified time, Chief Grafton and Ms. Pettengill noticed that the Appellant's name did not appear on Certification 05824, which was the second certification drawn from the pertinent eligible list. The Town notified the state's Human Resources Division (HRD) in this regard and the Appellant's name was placed on the Certification.
(Testimony of Grafton)

51. On November 6, 2018, the Appellant learned that a new certification, Certification 05824, was posted for the position of firefighter in Stoneham. (Testimony of Appellant)⁸
The Appellant was ranked first on this Certification. (Ex. 1)

⁸ Certification 05824 was issued from the same eligibility list from which Certification 05473 was issued regarding case no. G1-18-140.

52. On November 7, 2018, the Appellant went to Interim Town Administrator Debora Pettengill's office and signed Certification 05824. (Ex. 1) At that time, the Appellant asked Ms. Pettengill what additional information he needed to submit in order to be considered. Ms. Pettengill told the Appellant that they would be in contact with him. (Testimony of Appellant)

53. Thereafter, the Appellant contacted Ms. Pettengill and asked what information he needed to submit to be considered for the firefighter position and whether he would receive an interview. Ms. Pettengill told the Appellant that they would be in contact with him. (Testimony of Appellant)

54. The Appellant received no further information from Ms. Pettengill. (Testimony of Appellant)

55. It was a foregone conclusion that the Appellant was going to be bypassed in 2019. (Testimony of Grafton)

56. On November 8, 2018, Ms. Pettengill sent an email message to James Barron at the state Civil Service Unit within HRD. In her email message, Ms. Pettengill wrote, in part:

The Fire Chief just wants to confirm if we have to interview him again and/or bypass him again ... The Chief doesn't want to do anything that could be a technicality. (Ex. 11)

Mr. Barron responded,

How recent were the transgressions he was bypassed for previously? Generally the Commission looks at issues within the past 5 years. If the department feels that something that comes up in his background check is an automatic disqualifier for consideration, and no interview is going to change that, you can bypass the candidate because of it. (Id.)

57. Stoneham Police Chief Grafton did not see these email messages between Ms. Pettengill and HRD but understood that the Appellant would not be submitting an application, the town would not be arranging a background check of his criminal records or driving records, and Souza would not be given an interview. (Testimony of Grafton)
58. In addition to the Appellant, six candidates signed Certification 05824. (Ex. 1) One of the six candidates withdrew from the hiring process and one did not submit an application. The remaining four candidates (not including the Appellant) were hired and sent to the academy. One of the four candidates sent to the academy resigned. (Testimony of Grafton)
59. Prior to the selection of the four candidates, they were asked to complete and submit their applications, along with their driving records. (Testimony of Grafton)
60. On November 7, 2018, Chief Grafton, Human Resources Director Donna Gaffney, and Fire Capt. James Marshall interviewed the four candidates. (Testimony of Grafton)
61. On or about Nov. 13, 2018, Capt. Marshall contacted the four candidates' references. (Testimony of Grafton)
62. Although Chief Grafton had concerns about the candidates' driving records, he recommended to Ms. Pettengill that the four candidates be hired. (Testimony of Grafton)
63. The four candidates were given offers of employment subject to background checks, medical exams, physical ability tests, a review of their criminal records, and approval by the Board of Selectmen. (Ex. 21) This was the first time that offers of employment were subject to a review of the candidates' criminal records and background checks performed by the SPD. (Testimony of Grafton) However, the Town failed to produce the criminal records and background check information on the candidates who were hired.

64. In this hiring process, Chief Grafton did not review the materials that the Appellant submitted in the prior hiring process. (Testimony of Grafton)
65. Chief Grafton received the enhanced background investigation reports on the four (4) remaining candidates on or about November 20, 2018 from someone in the Stoneham Police Department. He either read or skimmed this information and was told that there were no problems with the four candidates. (Testimony of Grafton; *see e.g.* Ex. 16, pages 14 through 18)
66. Subsequently, Dennis Sheehan became the Town Administrator and hired the four (4) candidates without speaking to Chief Grafton. Chief Grafton does not know if Mr. Sheehan obtained any information about the four candidates with anyone in the Stoneham Human Resources Department before hiring them. (Testimony of Grafton)
67. Chief Grafton was not asked to draft a bypass letter for Mr. Sheehan, he did not provide Mr. Sheehan with the Appellant's criminal information, and he does not know what information Mr. Sheehan relied on for the Feb. 12, 2019 bypass letter that he (Mr. Sheehan) signed and sent to the Appellant. (Testimony of Grafton)
68. Not included in the 2019 bypass letter is the allegation in the 2018 bypass letter that the Appellant recently had been disqualified from consideration by the Cambridge Fire Department, which the Appellant credibly established here is untrue. (Ex. 2, 2018 appeal; Ex. 2, 2019 appeal; Testimony of Appellant)
69. Like the 2018 bypass letter, the 2019 bypass letter makes no mention of the fact that the Appellant fully disclosed his criminal record and driving record well past the 5-year period applied by Chief Grafton and other interviewers and referenced by HRD in his

application and to the SFD interviewers. (Ex. 2, 2018 appeal; Ex. 2, 2019 appeal; Testimony of Appellant)

70. Chief Grafton indicated that although the four candidates did not appear to have a concerning criminal or driver record, a closer look at their records at the hearing in the 2019 appeal raised questions:

Candidate 1 inconsistently stated that he graduated from Stoneham High School but also indicated that he received a GED. He wrote in his application that he was neither charged nor found responsible for motor vehicle infractions. However, his driver record produced by the SPD showed that in April 2015, he was charged with possession of liquor by a person under 21. In addition, the SPD records indicate that his criminal history data was available within Massachusetts but there is no indication that the appointing authority obtained it. (Testimony of Grafton; Ex. 14, pp. 29 and 30)

Candidate 2 misrepresented his academic status in his application to the SFD and during his interview. He indicated that he was on academic probation and suspension in 2011 (Ex. 16). But the records show that he failed out of school a second time and was suspended or placed on probation in 2012 and in 2015, events that the candidate did not disclose on his application. (*Id.*) In addition, this candidate had two accidents while working – one while working for a private company in 2015 and one in 2017 when he was working for the Town, for a total of three accidents. During his interview, this candidate said the accidents occurred because he “wasn’t paying attention” and was “in a hurry”. (*Id.*) Further, this candidate did not answer the application question asking if the applicant has been the subject of a restraining order. (Ex. 15)

Candidate 3 had a couple of accidents but they occurred ten years or so earlier and his license was suspended. Candidate 3 misrepresented his academic record, stating that he was on academic probation in 2009 but he was also on academic probation in 2010 and in 2017. (Ex. 18)

Candidate 4 had a surchargeable accident in 2017. (Testimony of Grafton) In addition, he is the former Chief’s son and Chief Grafton has known Candidate 4 since he (Candidate 4) was a little boy. In his application essay, Candidate 4 wrote, in part, “One of the questions in the application package asked do you know anyone at the SFD, my answer was too many to list. I have worked out with many members of the SFD in the basement of the fire station, helped a couple of times at the annual “touch a truck” events, collected for MDA as a youngster, and had had many meals with the firefighters. I guess you could say I took advantage of the connection you have when your dad is a member of the Fire department”. (Ex. 19)

The Town did not provide the Candidates' criminal records so that they could be compared with the Appellant's record.

71. Chief Grafton knew the Appellant's parents because the Appellant's father came to thank the SFD for their response to an accident where his wife was hurt. However, the only time Chief Grafton met the Appellant was when the Appellant provided pest control services at the Chief's house on one occasion. (Testimony of Grafton)

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. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304. "Basic merit principles" means, among other things, "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.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions [City of Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 189, 190-191 (2010), citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 824-826 (2006)] and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. Beverly, *ibid.*

The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown (Beverly, *supra*, citing Cambridge at 305, and cases cited). However, when the reasons for bypass relate to alleged misconduct, the appointing authority is entitled to such discretion "only if it demonstrates that the misconduct occurred by a preponderance of the evidence." Boston Police Dep't v. Civ. Serv. Comm'n & Michael Gannon, 483 Mass. 461 (2019), citing Cambridge at 305.

Analysis

After carefully reviewing the entire record regarding both appeals at issue here, I find that the Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant in both 2018 and 2019. At the heart of both appeals is: (1) a fatally flawed hiring process; and (2) the Respondent's failure at the hearings to produce either documentary or testimonial evidence of the manner in which the appointing authority rendered its hiring decisions. All candidates are entitled to a process that adheres to civil service basic merit principles and is capable of review.

The 2018 Appeal

The Respondent has not established by a preponderance of the evidence that it had reasonable justification for bypassing the Appellant in the 2018 hiring process.

As a Stoneham firefighter candidate in 2018, the Appellant brought with him a wealth of applicable experience, knowledge, achievements, and dedication. While still in high school, the Appellant enlisted in the Marines and served in the Marines after high school from 2005 to 2011. As a Marine, the Appellant received fire and hazardous materials-related training. During his active-duty service in Kuwait, the Appellant was a squad leader of 12 Marines and he trained foreign forces of 200 to 1,000 people. During his service, the Appellant was appointed to the position of Presidential support duty, protecting then-President Bush from the White House to overseas. He received the Good Conduct Medal for his service from 2006 to 2009 for “exemplary personal and professional conduct.” When the Appellant’s service ended in 2011, he began working at a pest control company, where he was still working seven years later when he applied to the SFD in 2018 and where he had been promoted to Supervisor. In addition to his job, in 2011 and 2012 the Appellant was enrolled at Bunker Hill Community College (BHCC) to expand his knowledge of fire service. Boosting his related training as a Marine, the Appellant took courses at BHCC on Principles of Fire Safety, Hazardous Material Chemistry, Fire Prevention and Fire Protection Hydraulics and he earned his EMT certification. Further, the Appellant earned a number of certificates from the Federal Emergency Management Agency and Red Cross courses directly related to firefighting. In 2012, the Appellant also managed to join the Marine Reserves, where he has since become a Sergeant, with the responsibility for training and mentoring junior Marines.

In addition to his many significant accomplishments, the Appellant has been forthcoming both in his application and at his interview about mistakes he made (in a short period following his honorable discharge from the Marines) involving arrests in 2011 and 2013 and an OUI in 2011. In its bypass letter, the Respondent distorted these mistakes and relied on them to the

exclusion of his many accomplishments. The record shows that both of the Appellant's 2011 and 2013 arrests resulted in pretrial dismissals of all charges and that his license had been suspended only temporarily as a result of the California first-offense OUI. Following these events, the Appellant significantly reduced his alcohol consumption and changed his lifestyle and there have been no such incidents since 2013. The SFD application indicates that the OUI and two arrests do not even qualify as criminal records. The Appellant was so forthcoming in his application that he mistakenly answered "yes", that he had been the subject of a civil abuse prevention order when he was not. The Appellant disclosed his driver's record back to 2004 in his application and the bypass letter relied on his 14-year-old record even though Chief Grafton considers the driver record check to properly cover only the last five years. The Appellant's driver record for the prior 5-year period was limited to two accidents and a ticket regarding the size of a trailer the Appellant was driving. The "larceny" charge against the Appellant while he was in the Marines turned out to be a 2-day restriction to base related to a broken microwave oven and is of no consequence given his superior military service. The Police Chief's denial of the Appellant's request for an LTC is based on the Appellant's criminal charges five years or more that were dismissed. The Appellant's application to the Cambridge Fire Department was not disqualified; he withdrew. The Appellant gave the Stoneham interviewers all the related records in his possession and answered the interviewers' questions to their satisfaction and, based on the information the Appellant provided throughout the hiring process and his superior interview performance, they recommended his hiring unanimously.

When, as here, those delegated with the responsibility for reviewing candidates recommend a candidate for appointment, and the appointing authority overrules that recommendation, there needs to be something in the record to establish the reasons therefor.

Those reasons are lacking here. In addition, the only information in the record about the criminal and driver records of the two candidates who bypassed the Appellant in 2018 is the bypass letter sent to the Appellant which states, summarily, that neither of the other two candidates had a criminal record and that one of them had no driver record incidents of concern. Further, the only insight we have to the Town Administrator's bypass decision of the Appellant is Chief Grafton's hearsay statement at the hearing that the Town Administrator, at an unknown time and place, told the Chief to take a better look.

There are also a number of other significant shortcomings that undermine the appointing authority's case. For example, the appointing authority conducted an interview before checking the Appellant's criminal record,⁹ his drivers record, and his references. It is true that the Appellant was forthcoming about his criminal and driver records in both his application and at his interview.¹⁰ However, G.L. c. 6, § 171A specifically requires appointing authorities to notify candidates in writing if they have found criminal matters that may affect their hiring decision, which the Respondent did not do.¹¹ Furthermore, although the interviewers kept notes of their reactions at the Appellant's interview and their favorable notes of the Appellant's

⁹ In view of other grounds for disapproving these bypasses, the Commission need not address here the issue of whether the appointing authority properly considered information regarding any dismissed criminal charges involving the Appellant given general statutory restrictions on employers' access to criminal offender record information.

¹⁰ In fact, the Appellant was so forthcoming in his application that he mistakenly answered "yes", that he had been the subject of a domestic abuse restraining court order. The record shows, however, that he was not the subject of such a restraining order. Rather, following the arrest in one case a condition of his release from arrest was to remain away from his then-wife. However, the court removed that condition from the orders one month later before the case was dismissed.

¹¹ In fact, in 2018 it appears that the Town Human Resources Department supposedly conducted the criminal record check, although there is no documentation of such check. Further, it was suggested that the Human Resources Department also checked the candidates' driver records. However, the Town's Firefighter application form specifically states that the candidates are responsible for producing their driver records. Further confounding this case is that the driver records produced by the two candidates who bypassed the Appellant in the 2018 hiring process were apparently their motorcycle license records, which included no record of infractions, even though these two candidates submitted information with their applications indicating that they also had licenses to drive a car, for which they did not produce corresponding records.

interview are in the record, the interview notes of the two candidates that were hired are not in the record and so there is no way to compare at a minimum the interviewers' contemporaneous impressions of all of the candidate finalists. In fact, the only information in the record about the other candidates' interviews is an unsupported statement in the bypass letter asserting that the other candidates' interviews were "excellent" or "outstanding".

In sum, a reasonably thorough review was done by the interview panel and they recommended the Appellant but there is no evidence that the Town Administrator did a thorough review and he certainly did not sit and talk with the Appellant as the interview panel did.

The 2019 Appeal

The Town's hiring process fared no better in 2019 because (1) it continued the flawed process it used in 2018 with the exception that it, for the first time, it included what it referred to as a background check of the candidates, which background check was conducted by the Stoneham Police Department; and (2) it gave no consideration to the Appellant. That said, as Chief Grafton stated in his testimony, the Appellant's bypass in 2019 was a foregone conclusion. When the 2019 Certification was issued to the Town and the Appellant found out about it, he went to the appropriate Town office and signed the Certification. However, as soon as he did so, Ms. Pettengill, the Town's Human Resources Director, contacted HRD to ask if the Town was obliged to interview the Appellant because his name appeared on the 2019 Certification. The Appellant received no further consideration and there is no information in the record regarding the criminal and driver records of the selected candidates. Most significantly, the Town Administrator in 2019 relied on the decision of the 2018 Town Administrator, who, as stated above, never conducted a thorough review. In those circumstances, where there was no justification for the first bypass, there can be no justification for the second bypass. In addition,

given the passage of time between the Appellant's mistakes and his firefighter application, he deserves a fresh look.

Conclusion

For all of the above reasons, the Appellant's appeals under Docket Nos. G1-18-140 and G1-19-037 are hereby *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the state's Human Resources Division and/or the Town of Stoneham in its delegated capacity to take the following actions:

1. Place the name of Brian Souza at the top of the next Certification issued to the Town of Stoneham for position of permanent fulltime firefighter until such time as he is appointed or bypassed;
2. If Mr. Souza is appointed, he shall receive the same civil service seniority date as those candidates appointed from Certification No. 05473. This retroactive civil service seniority date is related solely to civil service seniority and is not intended to provide the Appellant with any additional compensation or benefits, including creditable time towards retirement.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on October 21, 2021.

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

James Hykel, Esq. (for Appellant)

Richard Massina, Esq. (for Respondent)

Regina Caggiano (HRD)