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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT  
DOCKET NO. 2184CV02672

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NOV 19 2023

TOWN OF STONEHAM

vs.

NOTICE SENT (3)  
11-08-23 BA

MA Off. of Attorney General  
Administrative Law Division

MASSACHUSETTS CIVIL SERVICE COMMISSION and  
BRIAN SOUZA

**MEMORANDUM OF DECISION AND ORDER  
ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Town of Stoneham ("Stoneham") seeks judicial review pursuant to G. L. c. 30A, § 14 of a decision by the Civil Service Commission, which reversed its decision to bypass Brian Souza ("Souza") for the position of permanent fulltime firefighter. For the following reasons, Stoneham's motion for judgment on the pleadings is **DENIED**, and Souza's cross-motion for judgment on the pleadings is **ALLOWED**.

**BACKGROUND**

This case arises from Stoneham's decision to bypass Souza for appointment to the position of permanent fulltime firefighter in the Stoneham Fire Department ("Department") on August 3, 2018, and again on February 15, 2019. The following comes from the Administrative Record.

In or about April 2016, Souza took and passed the firefighter civil service exam. Administrative Record ("A.R.") at 896. On June 4, 2018, Souza obtained and completed an application for a firefighter position with the Department. *Id.* at 897. In his written application, Souza was forthcoming with regards to his criminal history, which includes: a non-judicial punishment while he served in the military for Larceny in 2008; a suspended license due to a

charge of Operating under the Influence (“OUI”) of alcohol in March, 2011; an arrest for assault and battery in connection with an argument with his then-wife in June, 2011; and a 2013 arrest for assault and battery and intimidation of a witness after another argument with his wife. *Id.* at 894-95.<sup>1</sup> In response to questions regarding his driving record in the application, Souza again disclosed the OUI charge in 2011, and stated that he had been involved in five surchargeable car accidents between 2004 through 2015. *Id.* at 899. Souza also wrote that he had been denied a license to carry a firearm by the Stoneham Police Department on February 23, 2017, due to his domestic assault and battery arrests. *Id.* Souza ranked first on the certification that was posted for the position. *Id.* at 901.

On June 8, 2018, Souza interviewed for the firefighter position with Fire Chief Matthew Grafton (“Chief Grafton”), Human Resources Director Donna Gaffney, Captain James Marshall (“Capt. Marshall”), and Captain Al Minotti. *Id.* During the interview, they questioned Souza about his arrests, his driving record, and the non-judicial punishment for larceny he incurred while in the military, which Souza explained was for exchanging his broken microwave oven for one that was working. *Id.* at 900. They each agreed that Souza interviewed well and was well prepared. *Id.* at 901. Consistent with this assessment, Chief Grafton’s interview notes state that Souza had a “great interview” and “had grown up” since the time of his arrests and his troubled marriage. *Id.* at 899. Chief Grafton also testified at the Commission hearing that he did not consider the motor vehicle related infractions that were more than five years old, including Souza’s 2011 OUI charge. *Id.* at 901. Ultimately, the interviewers concluded that the appointing authority, then Town Administrator Thomas Younger (“Younger”), should hire Souza for the position of firefighter. *Id.*<sup>2</sup>

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<sup>1</sup> Souza’s domestic assault and battery charges in 2011 and 2013 were dismissed. A.R. at 895.

<sup>2</sup> Younger is no longer the Town Administrator.

On June 21, 2018, Capt. Marshall called Souza's references and conducted a criminal record check, noting nothing of concern and finding no new information. *Id.* at 902.

At some point during the hiring process, Chief Grafton recommended to Younger that he hire Souza. *Id.* Following Chief Grafton's recommendation, Younger told Chief Grafton to "take a better look" at Souza. *Id.* at 903. Chief Grafton concluded based on this statement that Younger was unwilling to hire Souza. *Id.* Thereafter, Stoneham sent Souza a bypass letter dated July 26, 2018, that provided reasons for Souza's bypass including his driving record and criminal history as well as reasons why two candidates ("Candidates A & B") ranked below Souza were chosen for the position instead. *Id.* at 903-04.

On November 6, 2018, Souza noticed that there was a new posting for the position of firefighter in Stoneham. *Id.* at 905. As before, Souza was ranked first on the certification. *Id.* at 164, 903-04.

On November 7, 2018, Souza asked Interim Town Administrator Debora Pettengill ("Pettengill"), who had replaced Younger, what additional information he needed to submit to be considered for the position. *Id.* at 906. After contacting James Barron ("Barron") at the Human Resources Division within the Civil Service Unit, Pettengill concluded that Stoneham would not be required to interview Souza again for the position of firefighter based upon his previous bypass for his criminal history and driving record.<sup>3</sup> *Id.* Souza received no further information from Pettengill despite Pettengill telling Souza that they would contact him. *Id.* Stoneham eventually hired four other candidates who submitted applications. Notably, these candidates

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<sup>3</sup> Barron stated in his email to Pettengill that "generally the Commission looks at issues within the past five years" when making bypass decisions based upon information that comes up in an applicant's background check. A.R. at 626. This aligns with Chief Grafton not considering Souza's 2011 OUI charge. *Id.* at 901.



were hired despite Chief Grafton's concerns about the candidates' driving records.<sup>4</sup> *Id.* at 907. Town Administrator Dennis Sheehan, who replaced Pettengill, sent Souza a bypass letter dated February 12, 2019. *Id.* at 511, 908.

Souza appealed both decisions to bypass him for the position of permanent fulltime firefighter. The appeals were consolidated and heard by the Civil Service Commission. On October 21, 2021, the Civil Service Commission issued a decision authored by Commissioner Ittleman, which ruled in favor of Souza.

In her decision, Commissioner Ittleman gave significant weight to Souza's military background and subsequent training, concluding that it demonstrated "applicable experience, knowledge, achievements, and dedication" and directly related to his ability to perform as a firefighter. A.R. at 912. The Commissioner noted that as a Marine, Souza received fire and hazardous materials-related training, served as a squad leader of 12 other Marines, "trained foreign forces of 200 to 1,000 people," and was appointed to the position of Presidential support duty, receiving a Good Conduct Medal for his service. *Id.* The Commissioner also noted that when Souza's service ended in 2011, he took fire service related community college courses; earned EMT certification and certificates from FEMA and the Red Cross directly relating to firefighting; and joined the Marine Reserves, becoming a Sergeant responsible for training and mentoring junior Marines. *Id.* The Commissioner further observed that in his testimony, Chief Grafton stated that Souza's experience as a Marine demonstrated his ability to "exercise good judgment under stress" making Souza a good candidate to become a firefighter, and that Chief

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<sup>4</sup> The Town did not produce the criminal records and background check information on candidates who were hired so they could be compared with Souza's. A.R. at 907. At the hearing for Souza's 2019 appeal, inconsistencies and misrepresentations regarding the four candidates' academic history and driving records were uncovered. *Id.* at 908-09.

Grafton and the other interviewers determined that Souza should be hired while having full knowledge of his driving record and criminal history. *Id.* at 901.

Against that backdrop, the Commissioner found that Stoneham failed to provide a “reasonable justification” for overruling Chief Grafton and the other interviewers’ recommendation to hire Souza. She explained that no one from Stoneham testified at the hearing to explain the basis for Administrator Younger’s comment that Chief Grafton should “take a better look [at Souza]” other than Chief Grafton, who spoke highly of Souza’s qualifications. *Id.* at 902. She also pointed out that the 2018 bypass letter relies on Souza’s 14-year-old driving record despite the Department’s policy of only considering applicants driving history for the last five years; and that the letter states that the two candidates (Candidates A & B) who were selected over Souza have “clean criminal record[s],” even though there is no evidence that Stoneham ever checked the other candidates’ criminal history or driving records before hiring them. *Id.* at 165, 904-05. Additionally, the letter erroneously stated that Souza was “disqualified from consideration” from a position with the Cambridge Fire Department when, in fact, he withdrew from consideration for that the position. *Id.* at 903.<sup>5</sup>

### **DISCUSSION**

The process for filling civil service vacancies is intended to assure that hiring and promotion decisions are based on merit (abilities, knowledge, and skills) and not arbitrary or improper bases (politics, favoritism, bias, prejudice, or personal connections). See G. L. c. 31, § 1; *Sherman v. Randolph*, 472 Mass. 802, 804 (2015). As such, the Civil Service Commission’s review of hiring decisions, which is *de novo*, focuses on the “fundamental purposes of the civil

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<sup>5</sup> As for 2019 bypass, Commissioner Ittleman concluded that where the 2018 bypass was not supported by a reasonable justification, the 2019 bypass was likewise unsupported by a reasonable justification as it relied on a nearly identical justification for bypassing Souza and there was no indication that Stoneham gave Souza’s application a fresh look in 2019. A.R. at 915.



service system – to guard against political considerations, favoritism, and bias in governmental hiring and promotion.” *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001). If the Civil Service Commission finds by a preponderance of the evidence that there was not a “reasonable justification” for the decision to bypass a higher scoring candidate, it will overturn that decision. G. L. c. 31 § 2(b); *Sherman*, 472 Mass. at 810. “Reasonable justification” exists where there are “adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Sherman*, 472 Mass. at 810, quoting *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 241 (2006). Procedural flaws in the decision-making process can “be a ‘red flag’ signaling that a bypass decision ... was motivated by political considerations, favoritism, or bias” and therefore not reasonably justified. *Sherman*, 472 Mass. at 812.

“A court reviewing a decision made by the commission is ‘bound to accept the findings of fact of the commission’s hearing officer, if supported by substantial evidence.’” *City of Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 (2010), quoting *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003). Substantial evidence is “such evidence as a reasonable mind might accept as adequate to support a conclusion, a test which takes into account the entire record, both the evidence supporting the agency’s conclusion and whatever in the record fairly detracts from that weight of evidence.” See *Covell v. Department of Social Services*, 439 Mass. 766, 783 (2003) (internal quotations omitted). Stoneham, as the party seeking review under G. L. c. 30A, § 14, bears the burden of demonstrating the invalidity of the decision. *Andrews v. Division of Med. Assistance*, 68 Mass. App. Ct. 228, 231 (2007). This is a heavy burden, as the Court must “give due weight” to the Civil Service Commission’s “expertise, technical competence, and specialized knowledge ..., as well as the discretionary

authority conferred upon it.” G. L. c. 30A, § 14; *Massachusetts Assn. of Minority Law Enforcement Officers*, 434 Mass. at 263-264.

Stoneham contends that Commissioner Ittleman erroneously “implanted her own judgment” for that of the appointing authority as to whether Souza should have been bypassed. This Court disagrees. Commissioner Ittleman’s decision was based on discernable flaws with Stoneham’s hiring process, which she found suggested that the bypass was not reasonably justified in light of the fact that Souza was well qualified for the position both objectively and in the eyes of Chief Grafton and the other interviewers. As noted above, among these flaws were the fact that the 2018 bypass letter: relies on Souza’s 14-year-old driving record despite the Department’s policy of only considering applicants driving history for the last five years; states that the two candidates (Candidates A & B) who were selected over Souza have “clean criminal record[s],” even though Stoneham was unable to provide any documentation that the Town had checked the other candidates’ criminal history or driving records;<sup>6</sup> and erroneously states that Souza was “disqualified from consideration” from a position with the Cambridge Fire Department when, in fact, he withdrew from consideration for that position. A.R. at 165, 626-27, 901-05. Given the flaws in Stoneham’s hiring process and the 2018 bypass letter, the disparate and seemingly incomplete review given to the chosen candidates, and the lack of evidence that Stoneham conducted a thorough review of Souza’s application before bypassing him, Commissioner Ittleman’s decision that Stoneham failed to provide a reasonable justification

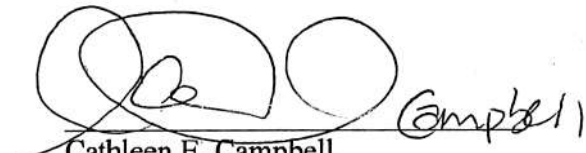
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<sup>6</sup> The record indicates that the Department only obtained records for the Candidate’s motorcycle licenses even though the candidates also had driver’s licenses. A.R. at 904-05. The 2018 bypass letter also fails to indicate that Candidate A refused to authorize the Department to contact 3 of his 5 prior employers and Candidate A’s position at a private fire protection business was in sales. *Id.* Additionally, although Candidate B listed on his application that he has been in one car accident, an accident is not reflected in any of the records provided. *Id.*

for bypassing Souza is supported by substantial evidence in the record.<sup>7</sup> *Sherman*, 472 Mass. at 812 (internal citations omitted); *City of Beverly*, 78 Mass. App. Ct. at 188, quoting *Leominster*, 58 Mass. App. Ct. at 728. As such, the decision of the Civil Service Commission to allow Souza's appeal is affirmed.<sup>8</sup>

### **CONCLUSION AND ORDER**

For the foregoing reasons, it is **ORDERED** that the Plaintiff's Motion for Judgment on the Pleadings is **DENIED**, the Defendant Brian K. Souza's Motion for Judgment on the Pleadings is **ALLOWED**.

  
Cathleen E. Campbell  
Justice of the Superior Court

November 6, 2023

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<sup>7</sup> The Court agrees with Commissioner Ittleman that where the 2018 bypass was not supported by a reasonable justification, the 2019 bypass was likewise unsupported by a reasonable justification as it relied on a nearly identical justification for bypassing Souza. In addition, the 2019 bypass letter contained flaws and omissions regarding the selected candidates driving records, criminal history, and academic backgrounds. A.R. at 511-13, 908-09.

<sup>8</sup> This decision does not stand for the proposition that a candidate's criminal history (even criminal charges that were dismissed) cannot serve as the sole reason to bypass a candidate. Rather, this decision relies on the numerous flaws in Stoneham's hiring process, the lack of evidence that Stoneham conducted a thorough review of Souza's application, and, its failure to provide evidence before the commission that it adequately reviewed the driving and criminal histories of other candidates.